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ACCESS TO CABINET CONFIDENCES ©

Some Experiences and Proposals to Restrict
Cabinet Confidentiality Claims



by

Ken Rubin
68 Second Avenue
Ottawa K1S 2H5
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FOREWORD

There was public concern in 1982 when, at the eleventh hour, the Canadian government decided not to permit judicial review of cabinet confidences under the Access to Information Act. * Previous drafts of the access legislation had categorized most cabinet records as exempt but did not exclude cabinet documents from the purview of the Act.

Public concern about excluding most cabinet confidences from the Act continues in 1986 and is evident at almost every hearing of the Parliamentary committee reviewing the Access Act. The issue of what to do about the near total exclusion of cabinet confidences from public access will simply not go away.

In 1983, this independent researcher began to use the Access to Information Act to obtain selected cabinet confidences that were stated as being accessible under Section 69(3) of the Act. ** The report that follows deals with this experience and, as well, describes a dozen access cases where I was denied portions of cabinet records on the grounds of Section 69(1) or one or more of its subsections. ***

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- * The term "cabinet confidences" is used in most instances throughout this report as opposed to the more neutral term "cabinet records" or "cabinet documents or papers" because it is the legal terminology employed under Section 69. Even cabinet confidences that are disclosable under Section 69(3) are still awkwardly entitled "confidences".
- ** Under Section 69(3), two types of cabinet confidences are disclosable - those over twenty years old and discussion papers sent to cabinet where decisions have been reached and have either been publicized or are four years old.
- *** Section 69 essentially defines, although not exhaustively, cabinet confidences in terms of cabinet record categories. Under Section 69(1), cabinet memoranda, discussion papers (except those under Section 69(3)(b)), agendas, meeting minutes, decisions, inter-ministerial communications and briefings, and draft legislation remain excluded from the Act and are not disclosable for twenty years.

In addition, available data on claims of cabinet confidentiality and the accessible instructions on the cabinet record system produced by the Privy Council Office are examined. *

Using these research approaches I reached three main conclusions:

- . Cabinet records, even when they are declared accessible under Section 69(3), are not consistently available or readily disclosable.
- . False and broad claims of confidentiality can be made so that records can be excluded as cabinet confidences
- . There is too much needless secrecy regarding cabinet records.

The investigation also uncovered some useful cabinet records. This report includes the most comprehensive listing, to date, of departmental discussion papers to cabinet available inside or outside the Government of Canada.

A series of recommendations are presented in the report, many of which have already been given to the Justice Committee reviewing the Access Act. The basic recommendations made include:

- . Severing the factual data from the politically sensitive material from cabinet confidences
- . Placing specific restrictions on what records may be considered cabinet confidences
- . Subjecting government claims for cabinet confidentiality to judicial review
- . Making improvements in the system of cabinet record keeping to allow for more effective public access and scrutiny.

* Cabinet confidences can be generated by individual ministers or by ministers acting collectively as the cabinet. The Privy Council Office, acting as the cabinet secretariat, controls those cabinet confidences generated by ministers acting collectively such as cabinet and cabinet committee agendas, meeting minutes, and records of decision. Individual departments control cabinet confidences that their ministers prepare for cabinet such as cabinet memoranda, discussion papers, and briefing notes. The Privy Council Office can also prepare these categories of cabinet confidences.

The author gratefully acknowledges the help he received in trying to understand what is essentially a system of categorizing cabinet confidences that not even insiders consider to be entirely logical or defensible. The conclusions reached here, however, are those of this public interest researcher alone.

Support received from the Explorations Program of the Canada Council contributed to ensuring the report's production.

Hopefully the access to information experiences presented in this report will help to demystify the concept of cabinet confidences and make some contribution to the current debate over the degree of secrecy that is needed to protect cabinet confidences.

SUMMARY

CLAIMS FOR CABINET CONFIDENTIALITY: ABUSES, ABSURDITIES,
AND PROPOSALS TO RESTRICT SUCH CLAIMS

Ken Rubin, an independent researcher, has released a report that describes his experience of using the Access Act to obtain accessible cabinet confidences and a dozen cases where he was denied cabinet confidences.

The following cases and events are among those included in the report:

- . Public Works denied Mr. Rubin access to hundreds of documents on urea formaldehyde insulation use in federal buildings for 20 months because the department had wrongfully labelled them cabinet confidences
- . Treasury Board used the cabinet confidence section of the Act to deny Mr. Rubin the draft plans to publicize the Access Act
- . Agriculture, Energy Mines and Resources, External Affairs, Justice and Health and Welfare took a year or more to locate and process their accessible discussion papers, the vast majority of which had not been previously released, while other departments like Finance, Regional Industrial Expansion and Transport refused to provide Mr. Rubin with basic discussion papers unless he agreed to pay hundreds of dollars in search and preparation fees
- . The PCO prepared for Mr. Rubin a list of all the cabinet meeting agenda items for the period 1954-64 and specific portions of those meetings as he requested.

Mr. Rubin made several important findings:

- . Departmental discussion papers to cabinet are not currently being produced and none of the other cabinet confidences that have been produced since mid-1984 will be accessible to the public for twenty years
- . Many discussion papers which are largely factual in content have been excluded from access because departmental officials added a short section of recommendations to cabinet and the Access Act does not permit severances of the factual part of excluded cabinet confidences

- . Minutes of cabinet meetings are prepared in such a way that they do not really reveal any differences of opinion among cabinet ministers, this being the major reason for keeping such cabinet confidences secret
- . The government has decided to do away with the only specific public reporting system on departmental claims for cabinet confidentiality without offering a replacement
- . Cabinet confidences that are only available after twenty years tend, for the most part, to contain fairly ordinary data that is already publicly known.
- . After a twenty year delay, many cabinet confidences, except cabinet meeting agendas must still be requested under the Access Act and are not automatically prepared for public release or necessarily disclosed in whole without exemptions.

These findings have led Mr. Rubin to make proposals to restrict broad and false claims of cabinet confidentiality. The first recommendation made is to allow the factual data contained in cabinet confidences to be severed from politically sensitive data so that it can be made readily available to the public.

Secondly, Mr. Rubin believes that politically sensitive data should only remain confidential for a maximum of ten years and should be released earlier when it concerns matters of health, safety and the environment. He also wants independent courts to be the final arbiter of claims for cabinet confidentiality.

Finally, he advocates improving the system of cabinet record keeping and making it easier for the public to know about and access cabinet records.

Mr. Rubin hopes that his access experience will help to demystify the concept of cabinet confidences and contribute to ending the needless secrecy of many cabinet records.

His report entitled Access to Cabinet Confidences is available for \$35 plus delivery costs from the author. Write to Ken Rubin, 68 Second Avenue, Ottawa, Ontario, K1S 2H5.

Mr. Rubin has written several other reports on access to information and has done considerable writing in the field of privacy and consumer affairs. He has also acted on behalf of various groups and individuals to obtain government records.

CHAPTER I: GAINING ACCESS TO SPECIFIC CABINET CONFIDENCES USING THE ACCESS ACT

On the surface, the task of identifying accessible cabinet confidences is an easy one. Section 69(3) of the Access Act states that cabinet confidences over twenty years old can be made available to the public, and so can discussion papers to cabinet in cases where the decisions have been publicized or are four years old.

I set out to examine the actual procedures and problems in obtaining accessible cabinet confidences under the Act. The following three categories of confidences were chosen for review:

- . all the cabinet agenda items from the period 1954-66
- . specific portions of minutes of 1954-66 cabinet meetings
- . the discussion papers to cabinet created by 16 federal departments and agencies. *

Several other applicants, primarily journalists and academics, have also applied for specific accessible cabinet confidences. I believe that my applications, however, are the only ones that have been made deliberately to test access to cabinet confidences in a systematic fashion.

* A sample of each record category is provided in Appendix One.

SECTION ONE: CABINET AGENDA ITEMS AND MINUTES FROM 1954 to 1966

1. Records Requested

Written cabinet meeting minutes have been produced since the wartime cabinet of 1940. * Cabinet usually meets weekly and its conclusions are reported by the Clerk of the Privy Council. The tradition has become established whereby these minutes become automatically available to the public as archival material after thirty years, the point in time when they are transferred from the Privy Council Office (PCO) to the Public Archives of Canada.

With the proclamation of the Access Act in 1983, cabinet meeting minutes over twenty years old became available. However, for the first ten years cabinet minutes are to remain under the control of the PCO and are not automatically prepared for release; they are available only on request under the Access Act.

In 1984, the author wanted to make the exercise of applying for minutes of the 1954-64 cabinet meetings substantially easier, so I filed a request with the Access Office at PCO to receive a copy of every cabinet agenda in this period. I had earlier been informed by the PCO that there were about 15,000 pages of 1954-64 cabinet meeting minutes and that the PCO did not have the resources to undertake such an Access Act request. By early 1985, the PCO was able to release over 1,200 pages of cabinet agenda items from the St. Laurent, Diefenbaker, and Pearson years.

* Before 1940, according to PCO, the only written record of Cabinet decisions or policies was contained in a letter that went to the Crown's representative in Canada, the Governor General, from the Prime Minister. As far as I know, no one has tried to obtain these documents under the Access Act.

I eventually applied for access to a very small portion of the estimated 15,000 pages of minutes of cabinet meetings from the period 1954-64. The fifteen selected subjects included cabinet discussions on social insurance numbers, the secrecy provisions of the income tax act, chemical spraying to control the spruce budworm, and a telephone rate appeal to Cabinet.

2. Information Obtained

The data obtained from cabinet meeting records was very diverse. Five examples are provided below.

In one access case, I obtained a copy of the cabinet discussion related to one of the first requests for greater federal involvement in provincial programs to combat the spruce budworm with chemical spraying. The discussion indicated a federal willingness in 1955 to assist British Columbia with its chemical spraying on Vancouver Island. Two hundred and thirty thousand dollars in assistance was approved, in part, because of an earlier precedent. Three and a half million dollars had already been given to New Brunswick because its forest industry and government officials had made a strong request for this aid. Records in 1959 and 1964 show that New Brunswick later came back to request millions of dollars in additional assistance for its aerial spraying program. This data obtained was shared with various environmental groups.

In another access case, I viewed records of cabinet meetings that dealt with how cabinet handled the very first telephone rate appeal in 1958. The appeal was launched against Bell Telephone's proposed 4% rate increase which had been approved by the Canadian Transport Commission. Cabinet records disclosed that at one point the rate increase was being considered for rejection (in the end it was approved) and that cabinet members raised concerns about whether Bell's deferred tax credits should be considered as revenue for rate regulatory purposes. These cabinet deliberations are of contemporary

interest because cabinet can still consider telephone rate appeals and current communications legislation gives cabinet a far greater role in directing communications policy than had previously been the case. These records obtained were shared with consumer groups involved in telephone rate hearings, some of whom launched cabinet appeals related to more recent telephone rate decisions.

A 1964 cabinet meeting record showed that the Minister of Labour Mr. MacEachen endorsed a publicity proposal, accepted by cabinet, to invite Canadians to apply voluntarily for social insurance numbers in cases beyond the compulsory one of re-registering for unemployment insurance. At the same time, however, government policy dictated that SIN use should be limited and not encouraged. *

A 1955 record indicated that Prime Minister Pearson and his cabinet decided to allow cabinet members to once again accept the invitation to attend the annual celebration of the October Revolution at the Russian Embassy. The Prime Minister noted that he had not attended any function at the Russian Embassy since 1949, due to the Cold War climate, but that with the international climate changing, he and two or three of his Ministers would attend.*

Another interesting item germane to this report, concerned Prime Minister Diefenbaker's position on the degree of cabinet secrecy. At the first Diefenbaker cabinet meeting in 1957, the Prime Minister stressed to his appointees the need to keep cabinet deliberations totally secret. ** The emphasis was not placed on how to release cabinet decisions or to inform the public of cabinet deliberations.

* Refer to Appendix One for these two records.

** This item was mentioned in the Globe and Mail column, "The Ottawa Scene", August 31, 1985, page 4.

3. Results Achieved

In mid-1985, I publicized the release of 1954-64 cabinet agenda items to major news organizations, the archives and historical and political science associations. * One organization, Southam News, decided to file over a hundred applications for access to specific minutes of these cabinet meetings. The applications resulted in several news stories based on the release of a number of pages of minutes. ** Several academics and other newspapers also made use of the agenda index. ***

With the increase in demand for the agenda index, the PCO decided to make the most recent cabinet agendas for 1965 and 1966 (now over twenty years old) available in its Ottawa reading room and upon special request, by mail to people outside of Ottawa.

4. Importance of the Records

The main reason for making cabinet agenda items from the period 1954-66 available to the public is to give applicants a very precise record index to help them make specific requests. There are, however, at least three other advantages to having access to cabinet agenda items. First of all, applicants can get a more accurate idea of possible costs and processing time from the Access Office at PCO by specifically citing cabinet agenda items. Secondly, having cabinet agenda records available enables applicants to discover subject matters that were dealt with by cabinet but which are not now very well known or remembered. Finally, cabinet agenda records provide a basis for requesting other accessible cabinet confidences such as memoranda to cabinet for which no equivalent public record index exists.

* My December 1984 application for 1954-64 cabinet agendas was, itself, one of the subjects of a newspaper story, "Government Files Difficult to Open", Globe and Mail, January 4, 1985, page 5.

** These stories included new information on the Canadian flag debate, the Canadian Bill of Rights and Canada's role in South Africa.

*** For example, the Montreal Gazette and Globe and Mail used cabinet meeting information to write mid-1986 stories on Canada's role in Vietnam during the Pearson years.

In addition to my own requests, I have examined the requests for cabinet meeting minutes made by other Access applicants up until mid-1986. These applications resulted in the release of only a small portion of minutes of cabinet meetings from the period 1954 to 1966. But the exercise of applying to gain access to several hundred pages of records is still very valuable, for at least five reasons.

First of all, minutes of cabinet meetings are an important, official way of confirming the occurrence of certain events in the period 1954-66. They provide a quick historical tour from the vantage point of cabinet.

Secondly, the minutes provide insight into the way cabinet functioned at that time and into the issues it considered for discussion. Minutes of cabinet meetings regularly include information on matters such as political appointments and, periodically, budgetary planning. Discussion of the following issues occupied a fair degree of cabinet time in the period 1954-66: the Columbia River Treaty (180 partial or full pages), the TransCanada Pipeline (90 pages), and the budget (about 41 pages). Other items, including the decision to grant Indians the right to vote and purchases of the federal district commission in Ottawa, occupied a few typewritten pages or paragraphs in the material that was reviewed.

Thirdly, minutes of cabinet meetings sometimes reveal new information which can provide a different focus on historical events. Reporters have used minutes from the meetings of the 1954-66 period to write updated stories on the Cuban missile crisis, the Montreal World's Fair and the Canadian Bill of Rights. New facts were uncovered, for example, on how the Diefenbaker Bill of Rights was developed and these facts differed quite substantially from the past public understanding of the issue. Diefenbaker apparently led the discussion for a "freedom of work" clause that his colleagues rejected. *

* Ottawa Citizen August 10, 1985.

Fourthly, having access to minutes of cabinet meetings often enables applicants to request access to accompanying memoranda, draft legislation and records of cabinet decisions or conclusions. Southam News, for example, was able to produce its story on the Canadian Bill of Rights because it gained access to the related cabinet conclusions and two draft versions of the bill of rights.

Finally, a review of past cabinet meeting minutes such as those dealing with regulatory rate appeals, can provide useful background to current policy deliberations. The Canadian Bill of Rights story has relevance, for instance, given the current initiative by the National Citizens' Coalition to have a "right to work" clause inserted into the Canadian Charter of Rights and Freedoms, against the wishes of organized labour.

5. Findings and Observations

Cabinet agendas are valuable record indexes and they should be made available automatically within a week after each meeting rather than twenty years later. Only 11 exemptions were applied to 1219 pages of 1954-64 cabinet agenda items. * If, on occasion, a cabinet agenda item is found to be exemptable, a revised Access Act could still provide the means for citing such exemptions subject to independent Court review.

Similarly, keeping minutes of cabinet meetings as cabinet confidences for twenty years is not reasonable. After reviewing several hundred pages of minutes that were over twenty years old, this investigator can provide the following justification for and clarification of this position:

- . The cabinet meeting minutes reviewed contain, in most instances, discussion about events and decisions that were already publicly known

* The following exemptions were cited: Section 19, personal information (seven times); Section 15, international affairs and defence (one time); and Section 16, law enforcement (three times).

- . The cabinet minutes were summary proceedings rather than verbatim reports. * As readily admitted by one Clerk of the Privy Council, Mr. Robert Bryce, cabinet minutes were taken "to record cabinet decisions, not write history." ** In other words, cabinet meeting minutes do not present full and frank deliberations and they are largely devoid of the differing opinions of cabinet members. The earlier release of the summaries contained in cabinet meeting minutes would do little, therefore, to destroy the principle of cabinet solidarity as government officials apparently fear it would
- . The Access Act allows for exemptions for sensitive portions of cabinet meeting records more than twenty years old. The main exemptions applied to the cabinet meeting records that were viewed by the author were: Section 13(1)(c), submissions in confidence from the provinces; Section 15, international affairs and defence; and Section 19, personal information. Releasing minutes earlier does not necessarily mean having to apply more exemptions. *** Since so few exemptions needed to be applied to the records viewed by the author, it is questionable why meeting records had to be kept secret for twenty years.

* The Privy Council Office, in a February 7, 1986 reply to the author, indicated that "verbatim reporting has never been the practice of recording Cabinet meetings. It is traditional to take written notes only which are later drafted into summary reports. On completion of the process, the notes are not retained". The destruction of such valuable notes may, however, be seen as a violation of the spirit of both the Access and Archives Acts.

** See the Ottawa Citizen's February 9, 1985 interview with Mr. Bryce who acted as secretary and recorded cabinet meetings for part of the fifties and sixties.

*** My access experience indicates that certain line departments would have applied many more exemptions to cabinet meeting records than the Access Office at PCO.

There may be a case to be made to consider not immediately releasing portions of existing records of cabinet meetings for up to ten years on matters of national security or when a few outsiders could gain considerable financial benefit before a cabinet decision is reached. However, there is no justifiable case for withholding most cabinet confidences for twenty years or even ten years, and recommendations to change this practice under the Act are made in Chapter IV. It is interesting to note as well that several former cabinet ministers, such as Donald Johnson, have written books recently about events, including their assessment of cabinet activities, that took place less than ten years ago. * In the author's opinion, the so called "secrets" of secret cabinet minutes turn out to be, on the whole, just as releasable as any minutes from municipal council meetings.

More controversial, I am sure, is my belief that cabinet meetings should be recorded verbatim so that a true accounting of what happened at these meetings could be preserved and later made available to the public. After all, recorded political confidences are not meant to be sanitized summary discussions; rather they should contain the give and take of those discussions in full.

A final concern I have about gaining access to agendas and minutes of cabinet meetings is that, when a revised time period is established, cabinet confidences such as these should be prepared in such a way that they are readily available without the need to apply under the Access Act. It is a disgrace that our nation's most basic decision-making records have to be made accessible bit by bit via applications and payments made by users of the Access Act. A nation that can spend taxpayers' monies on Canadian identity and content programs can surely make its cabinet deliberation records more easily available at the point when they become disclosable under the Access law.

* Perhaps the real reason for the twenty year ban on cabinet meeting records has to do more with providing a warning to cabinet ministers and officials to refrain from discussing or writing about the details of such events and differing opinions that were presented, rather than preventing the public from gaining access to distilled summaries of those events. One cabinet convention, not specifically spelled out in Section 69, also prevents members of one cabinet from gaining access to another cabinet's meeting records within the twenty year time frame.

Much of what I have said about cabinet meeting records applies as well to cabinet committee meeting records which became more numerous in the Pearson and Trudeau eras when the modern cabinet committee system was created and expanded. *

The discussion in the following section makes it clear that even when cabinet confidences are supposed to be accessible under the Act, as is the case with many departmental discussion papers to cabinet, an access user can be confronted with considerable costs, time delays, and other difficulties when he tries to gain their release.

* In 1964, Prime Minister Pearson moved from a system of various ad hoc committees of cabinet to create nine permanent cabinet committees. Cabinet committee deliberations came to be recorded, in summary form, by Assistant Secretaries to Cabinet responsible to the Clerk of the Privy Council. In 1968, Prime Minister Trudeau made more changes, including the addition of a Priorities and Planning Cabinet Committee, which has been called a forum for an "inner cabinet". The committees also met more regularly under Trudeau.

Records of Committee meetings after 1966 are not yet available for review but I did view some records from the Security Panel of the fifties and sixties, which was a type of ad hoc cabinet committee.

There have been very few requests for records of cabinet committee meetings over twenty years old, including for those of the oldest committee, Treasury Board, which has been in existence for over a hundred years.

SECTION TWO: THE LONG ROAD TO OBTAINING DEPARTMENTAL DISCUSSION
PAPERS TO CABINET FOR THE PERIOD 1977-1984

1. Nature and History of the Record *

Prime Minister Trudeau's government began using departmental discussion papers in January 1977 to present background explanations, analyses of problems and policy options to cabinet for consideration in making decisions.

The 1977 PCO instructions for producing discussion papers included directions to prepare sections on the object of the paper; background factors; alternatives; federal-provincial relations and inter-departmental consultations; and financial, time, public information and other considerations; along with a recapitulation section. ** Preparing such papers usually involved a fair amount of time and expense. Sometimes discussion papers were co-authored by more than one department.

Under the PCO guidelines issued in 1977, discussion papers were distinguished from cabinet memoranda in that they were not meant to contain recommendations to cabinet or political or other sensitive considerations. However, discussion papers usually accompanied cabinet memoranda although not all agencies prepared discussion papers every time they submitted a cabinet memorandum. ***

* Much of my understanding about discussion papers has come from discussions I held with PCO and departmental officials, and from my own direct experience with using the Access Act.

** The PCO's instructions on preparing discussion papers, obtained by the author under the Access Act, are entitled the Cabinet Paper System Handbook (1977), which was partially revised in 1984 under the title Guidance Handbook for the Preparation of the Memorandum to Cabinet. Originally, the PCO had told me that such instructions were not available as the PCO did not have any obligation under Section 71 of the Act, to produce an administrative handbook that did not affect the public.

An updated Handbook has been released on August 19, 1986 entitled Memoranda to Cabinet: A Drafter's Guide, that presents the changes suggested in 1984 in a clearer and more complete fashion.

*** A chart from the PCO dated June 18, 1980 indicates that 1611 cabinet memoranda were prepared in the period 1977 to 1979 while only 767 discussion papers were written during that time. The average number of cabinet meetings each year from 1977 to 1979 was 65. See Appendix Two for more details.

Contrary to public perception, discussion papers were never intended for public release unless a Minister used his or her discretion to disclose them on a wide or restricted basis after the relevant cabinet decision had been made. * This misconception may have arisen because discussion papers are often confused with government white and green papers, which were developed before discussion papers came along. While they serve as official public discussions on various subjects, green and white papers were never intended to be used directly in cabinet decision-making. **

Discussion papers, as classified documents, were to be distributed primarily to Ministers of the Crown, deputy ministers, members of the PCO, and other senior officials on a "need to know" basis. Occasionally, the distribution of discussion papers was restricted such that only specific ministers and authorized officials or those Ministers on the Cabinet Committee on Priorities and Planning received them. The 1977 PCO instructions, however, indicate clearly that discussion papers, while classified unless released, were "not deemed to contain confidences of the Queen's Privy Council for Canada". ***

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- * A PCO discussion paper dated October 4, 1979, entitled Release of Discussion Papers, estimates that only 1 in 20 discussion papers were publicly released between 1977 and 1979:

"In actual fact, since the present Cabinet documents system was established in January 1977, approximately 50 discussion papers (1800 documents have been submitted) have been released, the great majority of them following a decision, but some - especially in cases involving federal-provincial negotiations - prior to it."

No list of released or non-released discussion papers was attached to this 1979 PCO discussion paper. The 1800 figure appears high and is likely supposed to read 1000, given the rest of the statement. A separate June 18, 1980 PCO chart indicates that only 767 discussion papers were submitted to cabinet in the period 1977 to 1979.

Later in this section, I provide other data to confirm that very few discussion papers were publicly released by Ministers of the Crown.

- ** To confuse matters somewhat, in a few cases, like the 1979 Health and Welfare discussion paper on sports policy, these documents were also made into green papers with some modifications.
- *** Discussion papers, along with draft orders in council and ministerial orders were classified in the 1977 PCO instructions as "cabinet papers", and were not cabinet confidences like memoranda, draft bills, agendas, meeting minutes and cabinet discussion records.

The proclamation of the Access Act in 1983 brought about significant changes in the area of discussion papers. They now became classified as cabinet confidences falling into two categories. First, under Section 69(3)(b) of the Act, some discussion papers are considered to be disclosable (but subject to exemption). Disclosable papers are the ones that relate to cabinet decisions that have been publicly announced or are four years old.

In the second category are discussion papers under Section 69(1)(b) of the Act which are excluded from access for twenty years. This category includes any discussion paper that was drafted or presented to cabinet in circumstances where no decision was made or where four years have not yet passed since the decision was made. *

The preparation of discussion papers by departments has been a short-lived practice. Discussion papers were primarily produced in the period 1977 to 1980 when they became more and more rare until by the end of the Trudeau regime in mid-1984, they were virtually non-existent. **

In the initial 1977-1980 phase, the discussion paper format was viewed by the Trudeau government as a useful means of providing background to cabinet deliberations. The short-lived Clark regime was beginning to advocate discussion papers as potential tools of public information. For example, the following statement was contained in the October 1979 PCO discussion paper, Release of Discussion Papers:

It did not take long ... to realize that this type of document could be an excellent information tool both prior to and following a decision. Before a (cabinet) decision was reached it could serve as an informal green paper; after a decision it could be used to explain the often complex body of facts upon which a decision may have been based.

* Cabinet memoranda are similarly classified as excluded cabinet confidences under Section 69(1)(a) of the Act. With the exception of Section 69(3)(b) discussion papers, all other cabinet papers, only some of which are defined in Section 69(1) of the Act, are considered to be cabinet confidences that must be excluded from access for twenty years.

** Approximately three-quarters of the discussion papers I viewed were prepared in the period 1977-80; the remaining one-quarter were prepared from 1981 to mid-1984.

This PCO document included the suggestion that the Privy Council could publish a monthly list of released cabinet discussion papers and have the Cabinet Committee on Communications periodically review which classified discussion papers should be released. The PCO document also urged that a statement be issued at the time of the introduction of an access bill by the Clark government (when cabinet confidences were still exemptions, not exclusions) to announce the systematic release of more cabinet discussion papers.

This push by some insiders in both the Trudeau and Clark governments for greater openness in releasing discussion papers waned and was only partly incorporated in the Access Act. *

The gradual decline and disappearance of discussion papers was apparently due to a concern for administrative efficiency. Prime Minister Trudeau agreed with his staff after coming back in to power in 1980 that cabinet ministers should not be faced with excessive amounts of documentation to read, and efforts should be taken to prepare much shorter and more concise departmental documents that make recommendations to cabinet. **

From all of the evidence available to me, it appears that no departmental discussion papers have been produced under Prime Ministers Turner and Mulroney. What used to be included in discussion papers is now only included in cabinet memoranda. While the PCO's revised instructions on the cabinet paper system of mid-1984, as a matter of policy, still indicate that discussion papers can be

* It is ironic that I had to use the Act to obtain one access to information discussion paper from the Secretary of State and two privacy access discussion papers from Justice that had not been previously released. The PCO released two further discussion papers on access to information informally to me that another applicant had applied formally for under the Act.

** To illustrate this concern, the 1984 PCO guideline document quoted Winston Churchill as saying "Which page do I read?" when he was presented with a 90 page report.

*** Some departments like Consumer Affairs label releasable policy papers after mid-1984 (eg. on lobbying or the competition bill) as "discussion papers" but they are not records submitted to cabinet as cabinet discussion papers.

produced and that they should be publicly releasable, neither the two Prime Ministers nor their individual cabinet ministers have in practice developed discussion papers since mid-1984.

The PCO's 1984 guidelines note that if discussion papers are still to be produced, they should be developed as "a dialogue on large, new or complex issues ... to be released publicly as part of a communications programme". This notion that the policy of producing discussion papers still existed even though the practice did not was reconfirmed during the testimony of two PCO officials on June 5, 1986 in front of the Justice Committee during its hearings on the Access Act.

Despite an inside movement to continue to release the factual data contained in cabinet confidences, the demise of discussion papers has occurred without much public knowledge. As a witness at the May 20, 1986 Justice Committee review hearings on the Access Act, I reported on this matter that even most Committee members were unaware existed.

2. Access Administrative Problems

When I set out in mid-1983 to obtain recent discussion papers, I expected to find that this would be a fairly easy task. Little did I know that this would entail three years of dogged determination during which time I encountered administrative problems like record deficiencies, time delays, and some fee problems, as well as legal problems like extensive exemptions and excessive exclusions. The access fee, time, and record procedural problems I experienced are briefly described below. Problems related to exemptions and exclusions are described later in this section.

In mid-1983, I applied to the PCO for a list of accessible cabinet discussion papers, only to be told that it did not keep track of incoming departmental discussion papers, except by serial

number, and that a comprehensive list would be produced "when feasible". * It seemed to me that an inefficient system was in place when the PCO, as the secretariat to cabinet, did not even know which discussion papers had been written and which ones had been made public. ** My view on this was quoted in several newspapers immediately after the Access Act was proclaimed. ***

The only record eventually produced by the PCO after I pressed for a reply, was a 1980-81 list of over thirty discussion papers that had already been made public by various departments. ****

I complained to the Information Commissioner in October 1983, arguing that the PCO must surely have a record intake system to handle all of the departmental discussion papers it receives. The Commissioner supported the PCO's contention, however, that no one easily identifiable record or list was available.***** She also declined to support my representation that she could recommend to the PCO that it immediately undertake to review its records and produce a list of accessible discussion papers.

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- * It was somewhat disconcerting to hear the PCO witnesses in front of the Justice Committee on June 5, 1986 promise to provide the Committee with a list of discussion papers from 1980 to 1984 and 1984 to 1986. However, the PCO backtracked and wrote the Committee in July, 1986 indicating that it had no such available lists or statistics.
- ** The 1977 PCO instructions stressed that each discussion paper sent to the PCO should be signed and then registered before being distributed and that the efficiency of departmental registration of discussion papers would be subject to periodic PCO audits.
- *** Refer, for example, to the Southam News story, "Political Half-Heartedness Hurdle for Information Act" in the Ottawa Citizen, July 2, 1983, page 19.
- **** See Appendix Three for an edited copy of this list. Some departments, like Justice, have indicated that not all of the discussion papers on the list have actually been made public. In these few cases, either the list is inaccurate or the departmental records of what discussion papers have been released after 1977 are themselves incomplete. The Communications Secretariat of PCO had, at the time, conducted a telephone survey of departments relying on what departmental contacts told them. Yet on June 27, 1986 Justice wrote me indicating that the PCO 1980-81 list "appears to be erroneous with respect to the Justice discussion papers listed therein". Other evidence presented in this report confirms that it is very difficult to determine which discussion papers have been released to the public.
- **** See the Commissioner's 1984-85 Annual Report, p. 72.

By early 1985, after writing to the PCO and discussing the matter directly with access officials at PCO it became apparent that the PCO would not and maybe could not produce a list from its records. This left the more costly and time-consuming route of approaching individual departments for copies of their discussion papers to cabinet so that I could prepare a list myself.

Access Act requests were filed with sixteen agencies in April and July 1985. I singled out large departments who could be expected to have produced the vast majority of discussion papers. *

The sixteen agencies I approached were as follows: Agriculture, Communications, Energy Mines and Resources, External Affairs, Finance, Health and Welfare, Indian and Northern Affairs, Investment Canada, Justice, Labour, National Defence, Regional Industrial Expansion, Revenue Canada, the Secretary of State, Transport and Treasury Board. **

One administrative roadblock that arose was that three agencies - Finance, Regional Industrial Expansion (RIE), and Transport - refused to supply most of the discussion papers not previously known to be released without first receiving what they defined as search and preparation fees for locating and then severing some of these documents with exemptions. *** Finance wanted \$470, RIE \$3390, and Transport \$950. Finance and Transport took a few months before they presented me with their fee estimates.

I complained about these unreasonable fees, arguing that I should not bear the burden of locating and retrieving these basic departmental records. I undertook that RIE in particular and Transport as well were reluctant to do the work because reorganizations since 1977 made it difficult for them to locate their documents. All three agencies had not retained, or adequately compiled as the PCO requested of them, logs of all their cabinet discussion papers

* One source suggested that these agencies chosen were responsible for over 80% of the discussion papers prepared.

** I also received on an informal basis some discussion papers from Consumer and Corporate Affairs, Environment Canada, the Privy Council Office and Supply and Services.

*** RIE and Transport, months after I applied and only when they knew I was prepared to take them to Court, did reveal the existence of some of their discussion papers that had been previously released by their past Ministers.

since 1977. I did not believe that I should be held responsible for the cost of putting their records back in order. I further complained that it was unreasonable for these agencies to charge me for physically cutting and pasting out exemptions and exclusions from discussion papers because the 1977 PCO instructions to departments had stressed such papers were to be exclusively of a factual nature. In addition, the three departments chose to define "search" and "preparation" in a manner that was not specifically stated in the Access Act or Regulations. I also complained that Transport acted unreasonably in rejecting my public interest fee waiver application as did Finance and RIE in postponing final consideration of such a waiver application.

The March 1986 findings of the Information Commissioner upheld the three departments' desire to assess me search and preparation fees even though the thirteen other agencies I approached decided not to charge search and preparation fees. I applied to Federal Court in May, 1986 arguing that the three departments unreasonable exercise of their discretion amounted to denying me access to their discussion papers. The three departments filed with the Federal Court their submissions and affidavits in August, 1986, arguing that search and preparation fees were reasonable actions. * The oral arguments were heard in Court on September 4, 1986 and the Court decision is pending.

One responding agency, Justice Canada, in charge of policy developments under the Access Act, dropped its original \$50 search and preparation fee charge after I complained that I should not have to pay any fee. Justice clearly stated its change of position as follows: "This department agrees that the cost of making discussion papers available for review by the public should be borne by the government".

Very few responding agencies decided to charge me for full or partial copies of their discussion papers, particularly since they took so long to reply. Health and Welfare's decision not to levy a charge was based on an agreement with me that I would agree to their placing their disclosed discussion papers in their departmental library. **

* The written submissions are all found on Federal Court File T-992-86.

** Unfortunately, Health and Welfare's central library has recently been dismantled although branch libraries still exist. This has meant that the discussion papers released remain filed in a cabinet drawer as the Access Unit does not have a proper reading room facility.

The main administrative roadblock I faced with the responding agencies was lengthy time delays. In some cases these delays broke every rule in the book concerning the necessity to properly notify the applicant or the Commissioner of time extensions. Only Labour and Revenue Canada took under 70 days to process my request. Communications, Indian and Northern Affairs, Investment Canada, and the Secretary of State released information after time extensions of 120 days. Defence requested a 90 day extension but did not respond until close to 120 days. Even more disappointing was the fact that Defence merely provided me with three discussion papers that had already been previously released to other applicants.

Four of the five remaining agencies - Energy, Mines and Resources (EMR), External Affairs, Health and Welfare, and Justice - all ended up taking almost a year to respond. Agriculture has to date taken 14 months. None of these five agencies met their time extension deadlines of from 115 to 180 days and none of them bothered to seek further extensions. EMR's Access Coordinator indicated that I could always complain to the Information Commissioner about the length of time his department had taken to process my request, but he noted that the Information Commissioner could not take any disciplinary action against the department anyhow for not meeting its time deadlines. Even though I complained to the Commissioner in July, 1986 about the time delays of Agriculture Canada, that department had still not completed processing my request for discussion papers by the beginning of September, 1986. Agriculture has yet to finalize whether some twenty of its labelled discussion papers are disclosable.

The five offending agencies had to be constantly reminded to complete my request. I complained about time delays to the Ministers of Agriculture, EMR, External Affairs and Justice and the PCO President. My complaints may have helped to push the system forward a little but they did not result in finalizing any of these applications for several more months. At one point, Health and Welfare did not even bother to notify me for a few weeks that it had several discussion papers ready for viewing. External Affairs and Justice took several months to release discussion papers that had already been previously released.

One factor that appears to have contributed to the time delays was the reluctance of program officials to quickly review discussion papers in their domain. An extreme example of this was the unwillingness of officials from External Affairs to quickly review two discussion papers on Canada-United States fisheries arrangements. In a complaint to the Information Commissioner I singled out four senior External Affairs officials who deliberately held up the processing of these papers for several months.

Some other key factors that caused delays in the proper handling of my applications were poor record-keeping systems and the lack of knowledge among officials about past decisions that had been taken or information that had been released that had some bearing on whether I could obtain discussion papers.

Justice and Finance were just two of the departments that experienced administrative problems in locating all of their discussion papers. The 1977 PCO instructions requested departments to appoint cabinet liaison officers to handle the cabinet paper system systematically and efficiently. Some agencies however do not keep a separate record index for various cabinet confidences; they maintain record systems which group these documents under general subject headings. With staff turnovers, successors are often unable to locate the requested discussion papers. Then the situation arises, as it did at Finance, where the access staff are forced to go to their general record system, their program officials, and to the PCO to find out about their accessible discussion papers. Agriculture prepared fifteen papers for disclosure and then discovered a few months later that it had another thirty-one papers. It then has had to take several months to determine which of these papers could be disclosed. One of the papers it eventually released a year later, dealing with chemical residues in meat products, was not even a discussion paper!

Some departments also had great difficulty finding out if they had ever previously released their discussion papers. This was a relatively easy task if they had been released since mid-1983 under the Access Act although some agencies like Justice still took a few months to provide me with these same documents. What proved harder to determine was whether their Ministers had given approval

for the release of discussion papers before the Access Act came into force or outside the Access Act application process, either on a restricted or wider basis. Once an agency knew that a discussion paper had been previously released, they still had to check to see if the Minister or officials had properly declassified the document. Part of that checking process included ensuring that a cabinet decision had been made and when it was made prior to releasing any discussion paper.

The problem was at least two-fold. Some Ministers had released discussion papers and apparently not adequately informed their officials. But by far the greater problem was that many information services or Ministers' offices had not kept records of these fairly recent releases. Finding out about previous release of discussion papers could mean tracing the past Minister's speeches and coming up one year later, as Justice did, with an abridged paper on the Federal Court given at a Canadian Bar Association conference. It meant that some access officials had to do like External did and check their own library to determine whether some of their discussion papers had been previously released. External found a few papers which had been put in its Library long before my application had been filed, but it still took several months to release them to me. Agriculture Canada actually went to check the papers that its Minister had tabled in the House of Commons to see if they could find more discussion papers and further evidence of prior release. Transport only informed me about twelve of its 1980 and 1981 discussion papers being available in their Library a year and a half after I filed an Access Act application with them. RIE could only locate, after ten months, three discussion papers previously released and hinted that others in this category may have been destroyed or could be very difficult to locate.

Indian and Northern Affairs revealed to me that they had checked and obtained ministerial documents showing John Munro had released seven discussion papers right before his departure from the government on June 22, 1984. Yet the department could not determine who he had released the papers to because of inadequate records. Discussion papers obtained were rarely reissued as departmental publications or distributed centrally through the Canadian Government Publishing Centre.

It is difficult to decide given all of these administrative problems within departments, whether I received all of the discussion papers I was entitled to receive. I recognize that some

to follow various procedures to determine whether a discussion paper qualified for release and this required some extra processing time in comparison to some applications. However, inefficient information systems and obstructionist tactics are not acceptable reasons for departmental delay.

Some of the agencies in turn blamed part of the time delays on the step-by-step instructions issued in the PCO Counsel Office on how to review discussion papers to determine which ones are disclosable under Section 69(3)(b). These instructions were issued to departments in 1985 because the PCO Counsel Office anticipated that departments would have difficulty handling my applications. * In its wrapup letter to me on July 8, 1986, Health and Welfare wrote that the instructions slowed it down:

Although in our letter of August 13, 1985, we had anticipated that it would take about six months to review all discussion papers, thus completing the request by February of the current year, unfortunately owing to PCO Guidelines for handling Cabinet Discussion Papers, including search for the records, this was not possible.

There were some departments that could not understand why the PCO had not responded in the first place to my initial 1983 request for a complete list of departmental discussion papers. ** As well, some departments believed that the PCO should have played a stronger coordinating role in 1985-86 by carefully reviewing together all my requests to departments for their discussion papers.

* The May 27 and June 25, 1985 PCO Counsel's instructions were obtained under the Access Act and are found in Appendix Four. My impression is that the instructions were released to me reluctantly because the instructions contain legal advice on how to protect cabinet confidences. None of the departments receiving the PCO Counsel's instructions apparently objected to the release of the material to me. It is to the PCO's credit that they chose not to label these instructions cabinet confidences. Besides, I had correctly surmised that there were such instructions and found out the dates of their issuance so that the PCO could hardly deny their existence.

** The PCO Access Office itself, in response to another applicant's request, took several months to locate its own four discussion papers.

When I wrote to him about the PCO's role in the time delays, the President of the Privy Council squarely deflected any criticisms and argued that departments, not the PCO, must bear the brunt of responsibility for processing access requests:

Throughout the past three years I gather you have gained an appreciation, particularly in your discussions with officials at the Privy Council Office, of the complex issues and the large number of documents which must be considered in such a review. Many of these issues, I am sure, will be raised for discussion when the parliamentary committee meets to consider and review the implementation of the Access to Information Act and the Privacy Act.

However, as you may realize, the responsibility for extending time limits and claiming exemptions in a formal request is the responsibility of the individual department to whom you have made a request. The Act also sets out a procedure for making a complaint in the event you feel aggrieved.

Despite the President's words, the PCO was very involved in the processing of my applications. It played a significant role in reviewing many discussion papers that departments sent its way. Some of the departments also held consultations with officials from Justice and Treasury Board, in addition to those from the PCO. All of these consultations had the effect of slowing down the departments' response times although they may have helped to improve the ability of some of the more inexperienced departments to reply to my applications.

Many of the access officials who handled my requests became as frustrated as I did due to the long delays that resulted from sloppy record keeping, reluctant departmental officials, and lengthy consultations. One access official indicated that his department had never had such a problem in dealing with an access request. Another access official pleaded with me not to complain to the Information Commissioner after all the trouble she had been through. The last thing she wanted was to spend another year answering the questions of investigators from the Commissioner's Office.

My applications for discussion papers were not very complex but my experience has shown that the system in place in some agencies to handle them is incapable of responding quickly due to inexperience,

inefficiency, and a reluctance to deliver good service to the public. It is my strongest hope that the procedures involved in handling similar access requests will have to be improved in the near future. Feedback from several departments indicates that my applications have alerted them to some problem areas and that some procedures may be changed. It is acknowledged, however, that the solution to some of the administrative problems I experienced may only be possible through legal and political changes which are described later in this report.

One final procedural problem I encountered most of the time to date was a lack of support from the Information Commissioner's Office. I followed the formal complaint route on several occasions during the course of my examination into the accessibility of discussion papers. I complained to the Information Commissioner about: (1) the excessive search and preparation fees sought by three out of the sixteen federal agencies; (2) the time delays created by two departments; and (3) the exemptions that were applied by two departments.

Grounds exist to file other complaints about time delays and the application of exemptions, but I decided that the above cases adequately reflected the abuses I had to contend with that the Commissioner could fully investigate. The Commissioner has little power to investigate complaints about the proper application of Section 69 and thus no complaints about abuses on such exclusions were filed with her. Unfortunately, the Information Commissioner's support for my complaints to date has been minimal. In one area, I have chosen to go to Federal Court without her support to appeal the matter of fee barriers created by three departments for what I hope will be a more full hearing of the issues involved.

I have also chosen to discuss many of my problems in accessing discussion papers with responsible Ministers, the Parliamentary committee reviewing the Access Act, and other interested parties. These complaint channels seem to provide a more effective route than the initial legal approach of complaining to the Commissioner. I am still awaiting the full outcome of many of the representations I have made.

3. Information Obtained

I managed to review to date two hundred and thirty-five discussion papers. They range in length from three to two hundred typewritten pages. They are listed in Appendix Five.

Most of the discussion papers I viewed dealt with policy initiatives; for the most part each paper contained between two to five policy options designed to assist cabinet in its determination of the recommended course of action. * Some of the papers, however, served the more general purpose of presenting background information for inter-governmental conferences, offering explanatory material to accompany legislative changes, providing reactions to commissions or committees of inquiry, and submitting financial information to Cabinet.

The specific subject matter of these discussion papers was very diverse. The papers dealt with everything from native land claims and off-track race betting, to the Customs Act and the official languages policy. **

Some discussion papers are, at this point, of historical importance only. Others are still of current interest, but a few do not carry any value at all because they are so poorly written. A background paper from Communications Canada on book publishing, for example, is quite useful in the context of the current free trade talks, while a National Museums paper on possible site locations is useful from an historical standpoint. A paper on the communication electronics industry in Canada qualifies as an example of a fairly unintelligible and superficial discussion paper. Readers will have to decide for themselves how to rank discussion papers in terms of their importance as background analyses. It is difficult for outsiders to fully determine how much value cabinet ministers place on discussion papers. It is also difficult to know how many of the policy options that are presented to cabinet are actually presented in the form of discussion papers.

* One discussion paper from External Affairs, Canada In a Changing World, listed twenty-four policy options.

** More discussion papers dealt with native affairs than any other topic. The majority of such papers were produced by Indian and Northern Affairs.

Occasionally, discussion papers reveal departmental thinking that might not otherwise have been made public. For instance, in one paper the Labour department proposed to cabinet that labour representatives be placed on the boards of all crown corporations except those operating in the fields of finance and defence. A discussion paper from Communications Canada acknowledged that the department was thinking of taxing foreign film distributors in Canada, even though this would raise film prices. Another Communications Canada discussion paper advocated the position that Canada should join an international maritime satellite organization. A negative aspect of such a move would be the likelihood that Canadian taxpayers would have to accept a deficit of one million dollars annually for several years as the price of being a founding member. A joint External Affairs-Justice paper pressed for special Criminal Code sanctions against violent demonstrators at foreign embassies.* Finally, two External Affairs' papers, one on special Canadian financial assistance to Portugal after the Socialists came to power, and one on sending Canadian troops to the Sinai Peninsula to enforce the Camp David accord, show the pressure that the United States Government can place on Canada in regard to shaping our foreign policy decisions.

Discussion papers contain fairly recent background information that becomes useful in assessing current initiatives. For instance, Customs and Excises developed a 1980 paper on the Establishment of Duty Free Shops at the Land Frontier that is now helpful in evaluating the sometimes controversial current awards in August, 1986 of such duty free shops to Canadian businessmen.

Discussion papers are often very useful because they make the motivating forces of government action more explicit. A Health and Welfare discussion paper on organizing the International Year of the Child dealt at length with how to ensure a visible federal presence but at the same time avoid the appearance that the government held too much direct control over the event. The Polaris Project discussion paper prepared by Indian and Northern Affairs provided a crafted description of the rationale for federal subsidization of and participation in a mining venture with Cominco Ltd. One External Affairs paper indicated that Canada's willingness

* This paper was the basis of one of several articles written by a Toronto Star journalist who had submitted access requests for discussion papers on selected topics to several departments ("Law Fails to Stop Embassy Attacks", Toronto Star, April 24, 1986).

to join the U.S. sponsored multi-national peace force in the Sinai Peninsula could prove to be embarrassing, as was the promise to move the Canadian Embassy to Jerusalem unless Canada properly explained its involvement in the force in the Arab capitals.

It is also interesting to compare federal thinking laid out in discussion papers with current policy. Several papers that I viewed dealt with matters of current interest in the areas of Canada-U.S. relations. These included discussions of resisting American corporate take-overs, GATT, the Skagit River, oil pipelines, and the Moscow Olympics. Some papers also described how Clark's government wanted to deal with the privatization of crown corporations such as Eldorado Nuclear and Petro Canada. These papers help to shed considerable light on the initiatives new being undertaken by Mulroney and his Conservatives in these same areas.

Only occasionally do discussion papers reveal different policy initiatives. For instance, different approaches to changing spouse's allowances are outlined in two Health and Welfare papers, one prepared by the Trudeau government and one written by the Clark government.

An External Affairs paper on Southern Africa in 1978 revealed that almost ten years ago Canadian officials had considered applying some of the same, and more, sanctions against the Government of South Africa than those the Canadian Government has just recently adopted.

Some discussion papers point out inadequacies in departmental programs but, for the most part, they are not designed to be self-critical analyses. A Health and Welfare discussion paper on Amendments to the Radiation Emitting Devices Act (1980) included the frank admission that defective and substandard radiation emitting devices which do not adequately protect the consumer's safety have been allowed into Canada.

In another case, a Treasury Board discussion paper on Increased Indian, Metis and Non-Status Indian and Inuit Participation in the Public Service of Canada (1977) was critical of the low number of native peoples in the officer categories. Only three hundred and fifty-five out of twenty-five hundred natives employed then in the federal government had made it to one of the seventy-two thousand officer level positions. For example, federal programs for natives, including Environment Canada's 1977 Salmon Enhancement and Indian Fishermans program, did not have any native officers on staff.

Rarely did I come across a controversial discussion paper. One example was a paper developed by Treasury Board to try and deal with the volatile issue of indexed pensions for federal employees. * This paper was written in 1978 in response to the Tomensin-Alexander Associates Ltd. study and it is still bound to arouse emotions on this issue. This is especially true since the indexation of pensions continues to be the subject of negotiations between public sector unions and Treasury Board.

When a discussion paper is presented on more than one occasion to the cabinet, this is often, but not always, a good indication that a Minister was not fully successful in pushing his proposal through the first time around and he was forced to compromise his position. For instance, a proposal outlining changes to the federal minimum wage level was submitted by Labour Canada in 1977 and 1978. In the 1978 version, the upper and lower limits of an acceptable minimum wage were raised.

When there is more than one version of a discussion paper on the same topic, different orientations are sometimes revealed. For instance, an earlier Justice paper on cannabis reform compared the serious health effects of heavy use of cannabis products to alcohol and tobacco abuse yet this comparison was removed throughout the later version.

* For a description of the paper, refer to the Ottawa Citizen, January 25, 1985.

Some discussion papers like External Affairs' paper on Cuba are subject to many exemptions. In cases like these it is difficult to determine whether the papers contain significant sensitive data or whether they have been needlessly censored. Other papers, like the one from External Affairs on the Caribbean Commonwealth, despite the many exemptions made, still provide insight into how Canada viewed its economic political, and military options in that part of the world.

An External Affairs discussion paper on Federal Government Participation in the 1980 Special World Exhibition - Les Floralties Internationales de Montreal, provided a rare example of federal humour:

The Federal Government, if it decides to participate, should avoid appearing to compete with Quebec, the initiators of the event. Although Quebec is planning an exhibition of 6,000 square metres, a Federal exhibition of approximately 3,000 square metres is considered suitable and, more importantly, practicable, given the time constraints and difficulties which will be encountered in obtaining sufficient plant material. In the context of Les Floralties, the quality of the exhibition will be much more important than the scale. At 3,000 square metres, Canada would, at all events, be one of the top five exhibitions in size.
(paragraph 18, page 8)

Not so funny was the fact that portions of this discussion paper were initially exempted to avoid injuring federal/Quebec relations, until a complainant won a sympathetic ear from the Information Commissioner. *

4. Exemptions in Disclosable Discussion Papers - Some Contradictions

One access problem I experienced was the too frequent citing of exemptions. Exemptions were applied in about one-quarter of the discussion papers I viewed (see Appendix Five). Specific exemptions that were cited include 13 (information obtained in confidence from other government), 14 (federal-provincial relations), 15 (international affairs and defence), 20 (commercial information), 21 (policy advice),

* Information Commissioner, Annual Report, 1984-85, pages 62 and 63.

23 (solicitor-client privilege), and 24 (statutory prohibition). National Defence applied exemptions to all of its disclosable discussion papers and Investment Canada, to all but one. External Affairs applied exemptions to one-third of its papers.

The most severe cases of exemptions were ones where the entire discussion paper save the title page was exempted. External Affairs totally exempted three Fisheries papers using several exemptions including, in all cases, Sections 15(1) and 21(1)(c).

Investment Canada exempted in its entirety one 1978 discussion paper which described procedures to follow in Foreign Investment Review Act cases. Section 23 (solicitor-client privilege) was the cited exemption. This paper reputedly offered only legal advice on these procedures but it is arguable that portions of the paper could be disclosed as factual data and that the legal advice from 1978 could still remain secret. Blanket exemptions on two of the External Affairs papers are currently the subject of one of my complaints to the Information Commissioner.

Extensive exemptions were applied to other discussion papers. Sections 13, 15, 20, and 21 were applied throughout a paper by National Defence, Selection of a New Fighter Aircraft, rendering over half of the paper blank. Two previous applicants had complained to the Information Commissioner about this case (1985-86 Annual Report, page 51-52) but most of National Defence's exemptions were supported by the Commissioner.

A discussion paper disclosed under the Act by RIE previously seen by the author in 1984 was also extensively exempted. This discussion paper consisted of an Interdepartmental Task Force Report on the Canadian Petrochemical Industry. RIE tends to be very sensitive and defensive about disclosing industry information.

It did not seem very appropriate for agencies to cite the broadly worded Section 21 as an exemption in some of the discussion papers that were disclosed to me such as National Defence's.

Fighter Aircraft paper. The use of this exemption indicates one of two things. Either sensitive information was put into the papers that should not have been put there, in accord with PCO guidelines, or departments regretted having made these documents public and decided to claim a twenty year exempt period for certain items under the wide-open umbrella of policy advice. *

By citing the policy advice exemption, public officials are, in effect, still protecting the advice they have given Ministers, long after the cabinet decisions have been taken. This author believes that public officials' advice should be made public once a decision is reached or in some cases, even if no decision is reached. In this way one can see whether Ministers accepted or rejected their officials' advice in reaching decisions, based at least on the facts presented to them in departmental discussion papers.

The following excerpt from an Energy Mines and Resources paper was eventually released to me. At first, however, the excerpt had been kept secret using Section 21, so it illustrates well the type of material that officials consider sensitive and worth exempting:

The alternatives discussed in this paper have been discussed with representatives of the Department of Industry, Trade and Commerce, staff of the National Energy Board, the Federal-Provincial Relations Office, Treasury Board and the Department of Finance. With the exception of the latter two, all agreed that alternative (B) - compensate refiners/users - would be the best mechanism. Treasury Board has reserved its position on the question while the Department of Finance believes that extending the compensation mechanism to Syncrude further involves the Government in subsidizing the oil industry when movement should be in the opposite direction. It therefore preferred an alternative minimizing the Government's financial involvement. **

* Refer to my 1986 report, Suggested Changes to Canada's 1982 Access to Information Act, for ways to restrict Section 21 and other exemptions.

** EMR, Provision of International Prices for Synthetic Crude Oil Production, 1979, paragraph 20, page 12.

This excerpt reveals differences of opinion among Ministers. But the material is not worth exempting because it merely reflects the normal policy differences one would expect from these departments rather than differences caused by Ministers heading departments with vying political contentions.

A most blatant use of the policy advice exemption is evidenced in the case of several Agriculture Canada discussion papers where Section 21(1)(a) was used to totally exempt all the data on alternatives presented to cabinet.

The excessive use of Section 21 in several discussion papers dealing with native land claims was the subject of a complaint I lodged with the Information Commissioner in 1986. Unfortunately, the Commissioner supported Indian and Northern Affairs in its position that the data could be exempt because it touched upon negotiating positions and government plans. No evidence of what injury would occur was provided to me; the Commissioner merely claimed that it would not be advantageous to release the information. This ruling was quite disappointing in light of the Commissioner's earlier attempts to try and restrict the application of Section 21 when it involved agency meeting minutes.

I also find it quite suspect that information provided by provincial, foreign, or corporate bodies as background material for papers written by public employees, can be withheld without any proof that such claims are valid or that injury would result if the information became public. For instance, several EMR papers on the oil industry had deletions under Section 20 and in some Justice papers on criminal law and divorce reform, data from the provinces was deleted under Section 13.

The degree of severance can be illustrated too, using a 1979 EMR paper on West-East Oil Pipelines. Originally, I viewed a copy of that report with a few paragraphs removed under Section 15(1). Later I discovered that the subject of these paragraphs, still partly severed under Sections 13(1)(a), 15(1) and 21(1)(b), was communications about pipeline options between Prime Minister Trudeau and President Carter.

Most departments applied exemptions to some of their accessible discussion papers but others like Labour and Revenue Canada did not apply any. There were other discrepancies among the departments. Treasury Board, for example, released two discussion papers from 1977 and 1978 dealing with judgmental budget projections, including projections for specific projects. Finance, on the other hand, considers this same type of data to be exempt under Sections 18 (economic interest of government) or 21 (policy advice).

Obviously, departments did not always follow the PCO's 1977 instructions about refraining from placing sensitive data in discussion papers. It is equally certain that the PCO did not always perform careful checks before registering such departmental records for sensitive data as stipulated by the instructions. * In any case, citizens are the losers when departments claim that lines or sections of discussion papers containing background analysis warrant being kept secret.

I rarely encountered discussion papers that contained what I would consider to be sensitive data. If anything, most papers were routine syntheses of previously known data.

I did not appreciate the application of exemptions because this meant that I would be denied information, I would be expected to pay preparation fees by the more rigid departments for any information I did obtain, and the whole process of releasing information would be slowed down considerably.

The 1979 PCO discussion paper, Release of Discussion Papers, recognized the problems associated with exemptions well before the Access Act and before departments had to apply exemptions to cabinet discussion papers:

* The PCO Counsel's May 27, 1985 instructions to departments, however, acknowledged that exemptions could crop up in discussion papers and, as one review step, departments should "check to see (for themselves) if any exemptions apply ... to (their) discussion papers".

The access to information bill makes an exception (exemption) for such Cabinet documents as memoranda to cabinet, committee recommendations and decision reports. The case of discussion papers is different. Since they are not, properly speaking, confidential cabinet documents, they should not be exempted as such. Some maintain that discussion papers contain evaluations and subjective judgments and could justifiably be exempted as "opinions", but that is not the case of a well written paper. In short, it is more in keeping with the spirit of the bill - and perhaps with the letter, as well - that discussion papers be made public documents.

5. The Application of Section 69 to Disclosable Discussion Papers

I encountered a second denial practice which was perfectly legal under the Access Act, but which could not be legally challenged like the first practice of applying exemptions to disclosable discussion papers.

In about one-fifth of all the cases departments were able to use Section 69 or its subsections as the rationale for denying portions of disclosable discussion papers.

An example of a cabinet confidence that was excluded from a discussion paper but inadvertently released to me is provided here. The Section 69(1)(g) citation in a 1978 National Defence discussion paper on Katimavik reads as follows:

December 23, 1977 Cabinet approved (RD-591-77) the second pilot project phase and funding level for Katimavik to a maximum level of 10.5 million to September 1979 and agreed that further consideration to continue the program beyond the experimental phase would be subject to Cabinet review of the independent evaluation report by the Treasury Board Secretariat.
(paragraph 17, sentence 1)

This example shows that such exclusions can often be rather mundane in nature. This excerpt is technically not disclosable until 1998.

The basis for how, when, and why Section 69(1) can be applied to disclosable discussion papers is found in the following instructions from the PCO's Legal Counsel, dated June 25, 1985:

It is our position that, once you have determined that the criteria of paragraph 69(3)(b) have been met and, subject to our approval, severability may be applied to these records in order to remove the references that have been made to confidences of the Queen's Privy Council for Canada. Once severability has been applied the record becomes subject to the Access to Information Act and it can be reviewed to determine what, if any, exemptions may apply.

These instructions were meant to update the earlier Treasury Board directives of August 1983 outlined in that agencies' Interim Policy Guide:

If the reference to a confidence can reasonably be severed from the record in which it is found, this should be done to allow the rest of the document to become subject to the Act. The Access to Information Act does not provide for the severing of information from records that fall under paragraph 69(1)(g) but such a practice is required as a matter of government policy.

I suspect that most of the Section 69(1) exclusions I experienced in one in five cases during the course of my research were probably references to excluded cabinet discussion papers, memoranda, or decisions. In an extreme case, Treasury Board, even severed the serial number assigned to its disclosable cabinet discussion papers.

In some cases, departments did leave in references to cabinet decisions or discussion papers under twenty years old. But, it may be that these references were left in because the decisions or discussion papers were already publicly released by the Minister or the cabinet. For instance, in two discussion papers dealing with the same subject of providing services to the public, the inclusion of cabinet decisions was treated differently. A 1978 Treasury Board paper, only released in 1985 under the Access Act,

excluded any such references under Section 69. A 1980 Supply and Services paper, however, released publicly before the passage of the Act, made public references to cabinet approval of the work program of the Task Force on Service to the Public.

It is currently impossible for an independent body to know or verify which references to cabinet are publicly known. It is also difficult to identify discrepancies in the application of Section 69(1); such exclusions are not legally challengeable. Applicants must wait twenty years to find out about the portions of discussion papers excluded under Section 69.

6. Excluding Discussion Papers Under Section 69(1)(a)

My research has uncovered a scandalous but perfectly legal practice of ensuring that discussion papers are excluded. Quite a number of discussion papers labelled as such, and sometimes even accompanied by cabinet memoranda, are altered so that they become considered cabinet memoranda, themselves. This is done by departmental officials who did not follow the PCO's 1977 discussion paper instructions and decide to add a few pages of recommendations to the factual analysis of a paper. When recommendations are added to a discussion paper, it becomes an excluded cabinet memorandum, according to the terms of the Access Act.

The PCO's 1977 instructions warn that departments should not do this because only properly prepared discussion papers would be registered. But, in a letter dated July 26, 1983, a PCO Access official acknowledged that "There is a problem, however, since what is entitled a discussion paper might not in fact be a discussion paper but rather a memorandum to cabinet or a hybrid of the two".

When I was confronted with cases of information denial on the grounds that the discussion papers were treated as excluded cabinet memoranda, I pleaded that the discussion papers were prepared wrongly, and that the PCO should have requested that departments

revise the papers and give consideration to applying the severability principle as in Section 25 of the Act. I further complained that the PCO and the drafters of the Access Act must have had some awareness of the efficient preparation of discussion papers before the Act's passage and proclamation. Yet, they chose to ignore the problem which I encountered when using the Act. *

The PCO's 1985 instructions advised departments not to release the factual components of discussion papers to me if ministerial recommendations had been added to them. Most departments took no chances and checked with the PCO before disclosing any of their labelled discussion papers that possibly could be classified as excluded cabinet confidences under Section 69 of the Act. This "letter of the law" policy was described by one departmental official as the "when in doubt, throw it out" policy. Another departmental official noted one good reason for extreme caution: "I am not about to go to jail for revealing a cabinet confidence". ** Nonetheless, Agriculture Canada released a 1980 discussion paper on amendments to the Farm Improvement Loans Act and a 1982 discussion paper on changes to the Pedigree Act which did contain recommendations to cabinet. Two previously released Transport Canada discussion papers - one on Newfoundland Transportation and one on amendments to the Canada Shipping Act also contained some recommendations to cabinet.

I also received discussion papers that contained implicit recommendations to cabinet and were, therefore, on the borderline

* I am of the opinion that had cabinet confidences been subject to judicial review, a compromise position resulting in a broader release policy would now be in place.

** A recent firing of a senior Indian Affairs official for allegedly leaking documents on proposed native program cutbacks and his near criminal prosecution for breach of trust does tend to make public employees err on the side of extreme caution. In another case, still remembered in Ottawa, Walter Rudnicki, a senior CMHC employee, was dismissed in the early seventies by the President of CMHC. Rudnicki allegedly showed native leaders a draft cabinet confidence. However, he later won a case against his federal employer for wrongful dismissal and, in fact, did rejoin the public service for a time as a senior manager.

of being called cabinet memoranda. For example, the Secretary of State released a discussion paper on the funding options for the womens' groups assistance program that subtly implied government spending on this program should be increased. The paper outlined three options for the cabinet to consider: do not increase the funding, opt for a practical middle-of-the-road increase, or implement a substantial increase. The preferred option was obviously the second one.

Moreover, I gained access to some discussion papers that had statements in their concluding summary or recapitulation sections which explained what the cabinet ought to do, and amounted to stating what course of action cabinet should take. For instance, Communications Canada released a paper on Telesat which reinforced the cabinet's thinking that the CRTC was wrong in its decision to not make the Trans Canada Telephone System a full partner in Telesat.

Some of the disclosed discussion papers also included political considerations or analyses sections, matters which the PCO instructions stated should be confined exclusively to cabinet memoranda and ministerial communications. One cabinet discussion paper that was released to me from the Secretary of State even had a section on political considerations related to the subject matter, native communications.

External Affairs released one paper that contained some political analysis of the Carribean Commonwealth although it totally exempted another paper on the legal and political options to be considered in East Coast fisheries and boundary problems.

For the most part, however, I did not receive departmental discussion papers that, because of the inclusion of sections on recommendations and political analysis, could have been considered excluded cabinet memoranda.

As one additional note, Health and Welfare acknowledged in writing in July 1986 that it had denied me access to some of its cabinet discussion papers which turned out to be cabinet memoranda. The departments also stated there were other grounds for excluding its discussion papers to cabinet. For example, it cited subsections 69(1)(c),(d),(e) and (f) of the Act.

Health and Welfare did not satisfactorily explain to me whether, in denying access to excluded cabinet memoranda, these other subsections of Section 69 also applied to cabinet memoranda or whether, in effect, some of Health and Welfare's cabinet discussion papers turned out to be other types of excluded cabinet records. For instance, was a Health and Welfare discussion paper really a background note accompanying draft legislation and, as such, exclusively excluded under Section 69(1)(f)? The latter is possible as some discussion papers labelled as such by departments, at least after the Access Act's passage, could well have turned out to be excluded ministerial communications and briefing notes or notes attached to draft legislation or discussions about cabinet agenda items, decisions, or minutes.

7. Excluding Discussion Papers Under Section 69(1)(b)

Several departments refused to release all of their departmental discussion papers on the grounds that: (1) the papers related to cabinet decisions that had not yet been made, or (2) the discussion papers were under four years old and a cabinet decision had not been previously publicized (i.e. for the papers from the period 1982 to 1984). Section 69(1)(b) of the Act states that these types of cabinet discussion papers, no matter how factual they may be, can remain excluded from the Act.

When No Cabinet Decision Has Been Taken

One rationale for excluding background data related to cabinet decisions that have not yet been made appears to be the fear that such disclosures would cause increased pressure group lobbying of cabinet members. However, it would be assuming too much to attribute the content of existing discussion papers as the main reason why a pressure group would apply or continue to apply pressure to cabinet.

I believe that discussion papers should be disclosed before a cabinet decision is made because very few decisions are sufficiently sensitive that the background data used in their determination needs to remain secret. Why should the public be denied information simply because the cabinet found it difficult to make a decision to satisfy all the regions of Canada, or all the expressed viewpoints and politically expedient goals? The real problem with releasing these discussion papers may be that they would reflect badly on the ability of departments and Ministers to carry the day on cabinet decisions. *

The Four Year Wait

It is improper to treat cabinet discussion papers as excluded cabinet confidences simply because they are under four years old and are related to cabinet decisions that have not been publicized. The choice of four years as the cut-off point, for example, is an arbitrary one; all it does is create delays and problems for those of us who use the Access Act.

One departmental official mentioned to me that if six years had been the rule instead of four years, many officials would have taken advantage of the situation and refused access to discussion papers that dealt with particularly sensitive issues.

The PCO's May 27, 1985 instructions to departments indicated that the four year rule was to apply four years from the date of the cabinet decision, not four years from the date the discussion paper was prepared. The gap in time between these two events can often extend more than one year.

* Justice Canada released one discussion paper to me that fits into this category. It released Sovereign Immunity in Canadian Courts, 1977, because it did not find any reference in the paper related to the matter being decided by Cabinet. A similar paper was later released in 1980, State Immunity, on the grounds that a cabinet decision had already been taken.

As an outsider, I have no way of knowing or verifying when the last relevant cabinet decisions were taken or when the discussion papers were ready for release. Sometimes, a series of cabinet decisions are made on a subject and it may be a natural bureaucratic tendency to pin the eventual release of the discussion paper on the last cabinet decision in the series.

The 1979 PCO discussion paper, Release of Discussion Papers, actually included the option that discussion papers be released "as soon as they are registered by the Cabinet Papers Section". This option was referred to as the most "open" solution but was considered the least desirable course for PCO to follow.

Creating a category of discussion papers to be protected from public release for four years may very well create the impression that state secrets are being protected. Most of the accessible discussion papers I viewed during the course of my research were far from being super sensitive; nor were they, on the whole, chalk full of novel ideas or predominantly unavailable background information. Nothing suggests that discussion papers in the late 1982 to mid-1984 period falling under Section 69(1)(b) would be any different.

The PCO Counsel's 1985 instructions recognized that it may be difficult to draw the line between establishing a Section 69(3)(b) disclosable discussion paper and a Section 69(1)(b) excluded discussion paper. The way Section 69(1)(b) has been worded and interpreted ensured that I would not receive all or as many departmental discussion papers as I could have received.

External Affairs was one department that had to wait until March 1986 to release a cabinet discussion paper to me because of this rule, while Health and Welfare has indicated that it can only release one paper to me in November 1986, in accordance with the rule. * I also understand that Agriculture Canada has four papers in this category.

* I know of at least one other applicant who was denied access to a Transport discussion paper on Via Rail for the same reason. The Via Rail paper remains unavailable at least until March 1987.

8. Estimating the Number of Excluded Discussion Papers

As a result of the legal manoeuvres to exclude records labelled discussion papers, I estimate that I received less than half of the discussion papers prepared for cabinet by the agencies selected for review.

There are several reasons why I think this estimate is accurate:

- . Departmental discussion papers, as instructed by PCO in 1977, are to be numbered consecutively on an annual basis. Note the large number of numerical gaps in Appendix Five in every year for which I did not receive any discussion papers
- . PCO statistics indicate that the total number of discussion papers for all agencies could likely be projected in the fifteen hundred to two thousand range. Yet, I have only received just two hundred and thirty-five papers from many of the major departments responsible for preparing discussion papers.
- . Justice Canada provided me with twenty-two discussion papers under Section 69(1)(b) of the Act, yet its Access Unit indicated to me that it had reviewed forty-eight discussion papers *
- . A large department, National Defence, was only able to disclose three discussion papers for the period 1977-1984 and two of them dealt with the same subject. However, the department apparently considered at least a dozen discussion papers for disclosure under the Act.
- . The Executive Assistant to the Minister of Energy, Mines and Resources indicated, in a letter dated February 20, 1986, that the department was reviewing a "large number of lengthy documents". I only managed to receive nine EMR discussion papers.

* I have gleaned the titles of two papers excluded by Justice from the PCO's 1980-81 list attached in Appendix Three. They are Sexual Offences Against the Person 4-80DP and Review of the Criminal Code and Criminal Law Provisions of Federal Statutes 9-80DP.

The PCO instructed departments on May 27, 1985 to refrain from giving me the titles of discussion papers and the number of excluded discussion papers, or discussion papers that were re-classified as cabinet memoranda. The logic here was that this information, in itself, was considered to be a cabinet confidence.

I am confident that had I been able to receive the factual portions of departmental discussion papers, I would have received at least twice as many discussion papers from the thirteen agencies who initially replied to my request. Making more discussion papers, or even cabinet memoranda, accessible by allowing for severance would help ensure that the public finds out about factual information that departments send to cabinet.

9. Missing Discussion Papers

Just as I will likely never know the exact number of excluded discussion papers, I will never find out if departments failed to locate all their discussion papers prepared since 1977. Agriculture and Communications were two departments who found more papers several months into the exercise. Given the poor record keeping practices of some of the agencies, it is entirely plausible that I failed to receive all the discussion papers that were disclosable.

Nor will I likely find out how many draft discussion papers were prepared for cabinet but were never sent or finalized. The only draft that I received was Supply and Service's paper entitled Task Force on Service to the Public. Draft discussion papers that are not sent to cabinet appear to be regarded still as cabinet confidences.

The 1977 PCO instructions established a procedure for withdrawing departmental discussion papers for revisions at the direction of cabinet or a cabinet committee. While I received a few revised discussion papers, I have no way of knowing if departments sent me all of the discussion papers falling into this category.

Finally, I have had little indication of how many discussion papers were destroyed and under what rules. Justice was the only agency to write me in June 1986 indicating that one discussion paper on cannabis use "was apparently destroyed ... (and) superseded" by two later versions which I did receive.

I have no way of determining whether the above categories of discussion papers account for a small or large number of records or whether these categories are incorporated into the various PCO estimates of the number of discussion papers prepared by departments.

CHAPTER II EXPERIENCE WITH CABINET CONFIDENTIALITY CLAIMS UNDER SECTION 69 OF THE ACCESS ACT

Experience with accessing disclosable cabinet confidences has been described in the first chapter of this report. This chapter deals primarily with experiences in making subject oriented applications that ended up with the denial of access to some of the requested information on the grounds of cabinet confidentiality. *

The twelve cases described below illustrate the wide range of applications of Section 69. The last two cases in particular provide examples of the arbitrary and unjust use that can be made in claims for cabinet confidentiality. The case material shows that broad claims for cabinet confidentiality should and can be challenged.

CASE ONE: Severed Memorandum from the Inter-Departmental Task Force on TransBorder Data Flow

In 1983 Communications Canada severed a portion of an October 12, 1981 memorandum from a consultant, Mr. J. Knoppers, to a Communications Canada public employee, Ms. E. Kriegler, under Section 69(1). The subject matter of the memorandum was the reports of the Inter-Departmental Task Force on TransBorder Data Flow, originally set up in 1980 under Prime Minister Trudeau's initiative. The Task Force was made up of public employees from several departments who could not agree on how to treat some of the important issues in the developing international information market. Secretariat services for the Task Force were housed in Communications Canada under Ms. Kriegler.

It is unclear to this author why the comments of a consultant should have been considered cabinet confidences. Yet, the Task Force data would have remained dormant had I and others not filed Access Act applications. I managed to gain access to considerable amounts of valuable information although Sections 15,

* Appendix Six provides an example drawn from Case Seven of a record severed on the grounds of Section 69.

20, 21, 23, and 25 were applied as exemptions to some data. For instance, it appears that Section 21 (policy advice) was applied to delete the recommendations from several Task Force special reports on different aspects of the transborder data flow issue.

The fact that the Task Force had not been able to agree on recommendations to put before a cabinet committee was not used as grounds to exclude all the background documentation as cabinet confidences. Yet Section 69 was cited to remove comments made by a consultant working for the Communications Canada secretariat in the production of some of the reports.

CASE TWO: Denial of Information on 1984 Liberal
Patronage Appointments

In 1984 the PCO denied me access to records on the Liberal patronage appointments initiated by Prime Minister Trudeau and completed by Prime Minister Turner on two grounds:

1. The letters of correspondence between Trudeau and Turner are considered to be between Ministers which are not covered by the Access Act or under the control of the PCO. They are considered to be the personal and political records of the two Prime Ministers.
2. The records contain advice from the PCO to Prime Minister Turner and are to be treated like any other case of PCO advice under Section 69 of the Access Act. Furthermore, such advice was not even made available to Prime Minister Turner's successor, Brian Mulroney, under cabinet conventions.

Another applicant had complained to the Information Commissioner about a similar request. * The Commissioner asked for and received the Clerk of the Privy Council's certificate that all of the withheld records constituted cabinet confidences. The Commissioner then directed

* The complaint is reported on page 71, 1984-86 Annual Report, Information Commissioner.

the Clerk to confirm whether Prime Minister Mulroney approved of the denial. The Clerk indicated that "by convention" the successors to that executive office do not have access to the requested records. The Commissioner then informed the complainant that she did not have a mandate to pursue the case any further.

CASE THREE: Denial of a 1975 Canada Employment and Immigration Commission's Memorandum to Cabinet on Social Insurance Numbers

In 1982 I requested access to general information on social insurance number procedures and policies. One of the specific documents I requested on May 8, 1983 was the Canada Employment and Immigration Commission's cabinet memorandum on social insurance numbers dated July 19, 1975. On August 25, 1983 the Commission cited Section 69(1) to deny me access to this memorandum "and material associated with it".

While the Commission did release a fair degree of material on SIN procedures, it was extremely cautious in allowing me access to unpublished data on SIN policies. However, I did manage to view and obtain by mid-1986 certain sensitive federal-provincial exchanges on how SIN use could be encouraged in the provinces. The exemptions that were applied to this material were Sections 13, 16(2)(c), 19, and 23.

The Commission refused to release the factual or policy option sections of its cabinet records, including portions of one document which was ten years old. I was only able to obtain one cabinet confidence from the PCO which was older than twenty years. This document, an item from the minutes of a March 12, 1964 cabinet meeting, indicated that Prime Minister Pearson and Labour Minister MacEachen supported a publicity campaign that encouraged Canadians to obtain SIN numbers - and not just those Canadians who might be reregistering for unemployment insurance benefits. In contrast, published parliamentary debates from the early 1960's contain reassurances that the Government did not intend to encourage expanded SIN use.

An over ten-year old cabinet submission from Employment and Immigration remains secret under the Act even though it could contribute greatly to the current understanding of which personal information record linkages and identifiers should be permitted. I did not file a complaint with the Information Commissioner regarding this case of information denial but I did share all of the information received with interested parliamentarians, journalists, and civil liberty and consumer groups.

CASE FOUR: Exclusion of Cabinet Records on the 6 and 5% Anti-Inflation Program

Finance Canada released some background data on the 6 and 5% wage control program in 1983 but refused to release any related cabinet records because "none were cabinet discussion papers". Finance also refused to identify the titles of the excluded cabinet records. *

The background documentation that was released was subject to various exemptions - Sections 13(1)(c), 20(1)(d), and 21(1)(a)&(b) - but it revealed some of the reasons why this program was initiated. For instance, the 6 and 5% wage controls were imposed primarily on its own public sector unions because the Government wanted to show corporations that it meant business. The Government, however, exempted energy fuels increases from its guidelines because it did not want to affect energy prices adversely and risk losing valuable tax revenues.

Some of the background information that was released, including statistics on public sector/private sector wage differentials, likely appears in a more succinct form in excluded cabinet records. ** If so, these portions of cabinet records should be released to the public now, rather than twenty years down the road.

* Whenever Finance used exemptions to sever a document, the citations were very specific. However, when Finance exempted or excluded a record in its entirety, no titles were given for these records.

** The background data showed that the public sector wages that had become the subject of restraint control lagged behind the private sector wages that had not been restricted by law. See "6 and 5%", Toronto Star, December 6, 1983.

CASE FIVE: Exclusion of Ministerial Papers on the
Reorganization Plans of Bell Canada

In 1983 Communications Canada responded to an Access application by excluding two records as cabinet memoranda under Section 69(1)(a). One record was a ministerial paper by the Honourable Francis Fox dated October 15, 1982 and entitled Corporate Reorganization of Bell Canada . The other record was identified as an undated back-ground paper entitled Bell Reorganization .

I firmly believe that part of the second record could have been severed as factual data. However, I am not sure that many facts could have been gleaned from the record. Public news releases and speeches from the Minister in the fall of 1982 provide scanty back-ground information on Bell's plans for reorganization and this indicates that little was known about Bell's plans even though they would have a significant effect on telephone subscribers and federal telecommunications policy.

I was able to ascertain from some records that were released to me that much of the factual data and analysis that the government relied on was supplied by Bell Canada, including information used by officials to brief the Liberal and Conservative Party caucuses. Access to four documents was partially denied under Section 21(1)(a) (policy advice), including briefings from senior employees to the Minister. I was totally denied access to four documents under Section 21(1)(a) including the notes from senior employees designed to brief the Minister for separate meetings with the Chairman of Bell Canada and the CRTC Chairman on October 21, 1985. An April 19, 1983 record entitled Ministerial Speaking Note on Bell Reorganization Report also remained confidential as policy advice.

The impression I gained from the available data was that Communications Canada had few real concerns about Bell's reorganization plans and that senior public employees were primarily responsible for developing a fairly passive policy stance on this issue.

CASE SIX: Exclusion of File Material on the Freedoms of
Expression and Political Activity and the
Partisan Behaviour of Public Employees

A 1984 Access Act application to Treasury Board requested information on the freedoms of expression and political activity and the partisan behaviour of public employees. Very little data was received in early 1985. Much of the data was totally exempted under Sections 19, 21, and 23 and excluded under Section 69. *

Treasury Board responded to the request by simply noting the general file headings under which the claims for exclusion and exemption were made. For example, it listed the various parts of section 69 that were applied to the following personnel policy files: **

file 5130-12 - Conditions and Benefits of Work -
Freedom of Expression Policy Development

file 5130-01 - Section 69(1)(g)

file 5130-02 - Vol 1 - Section 69(1)(a)
Vol 2 - Section 69(1)(d)(e)(f)
Vol 4 - Section 69(1)(a)(e)(f)(g)
Vol 5 - Section 69(1)(a)(g)
Vol 6 - Section 69(1)(a)

file 3968-08 - Employment and Staffing
Public Service Employment Act
Political Activities
Vol 1 - Section 69(1)(b)
Vol 5 - Section 69(1)(a)
Vol 6 - Section 69(1)(a)(g)
Vol 7 - Section 69(1)(d)(e)

* Some of the data I received was used in a series of Ottawa Citizen articles printed on June 8, 1985. The main heading of the series was "Public Servants and Politics: Rules of the Game Confusing".

** Exemptions 19, 21, and 23 were applied to these and other files as well.

I filed a complaint in early 1985 regarding the broad and vague application of Section 69 to entire record files. The Commissioner's investigator has only begun to substantially review this complaint at the time this report was written.

A similar Access Act application was filed with the Public Service Commission and it yielded a great deal more data. The Commission did not cite Section 69 as a reason for denying documents although it did cite Sections 19, 21, and 23.

The Commission appears to be more responsible for the day-to-day administration of the political activity guidelines, while Treasury Board is responsible to a great extent for the development of policy in this area and the preparation of cabinet submissions. This may explain why Treasury Board relied so heavily on Section 69.

Treasury Board also appears to have total responsibility for the administration and development of policy in the area of freedom of expression for which Section 69 claims were also made.

I suspect, however, that Treasury Board applied Section 69 in a particularly broad manner in order to deny public employee unions access to information that could help them seek better political and freedom of speech rights. Treasury Board could be accused of applying the Access Act in an arbitrary and rigid fashion. For example, even Section 19 (personal information) was used to delete the names of Members of Parliament and a Member of the Ontario Legislative Assembly from their correspondence on these issues, even though most of the politicians were identifiable and, in one case, the Public Service Commission left the name of a politician on a record that the Treasury Board had deleted from its copy.

CASE SEVEN: Exclusion of Specific Pages of Minutes from
Atomic Energy Control Board Meetings

In 1985, after twenty months of waiting, the Atomic Energy Control Board finally granted me access to its 1975-83 meeting minutes. The minutes were released with various exemptions and five specific citations of Section 69 as follows:

1. Meeting of October 12, 1977: This was a special AECB meeting on the AECB's reaction to the proposed amendment of the Uranium Information Security Regulation. The proposed government amendment would tighten up the original 1976 Regulation which was designed to prevent the leakage of information about marketing arrangements of the uranium industry. It was presented in direct response to a United States court action involving the Westinghouse Electric Corporation that alleged that Canadian companies and government agencies were members of an international cartel fixing uranium prices. The Section 69(1)(g) citation deals with politically embarrassing situations that present a challenge to these Liberal Government "gag" regulations. In the sentence of the minutes immediately following the Section 69 citation, mention is made of the pending Ontario Supreme Court action filed by several Conservative Members of Parliament as well as a criticism of the marketing arrangement launched by one of these M.P.'s, Sinclair Stevens.
2. Meeting of January 12, 1978: Section 69(1)(a) was cited to exclude part of the minutes dealing with the issue of which federal agency should be responsible for coordinating the development of standards and remedial measures for private and commercial buildings in high radiation areas. * This discussion occurred at a time when the public was nervous about the government's admission to, or discovery of, radiation contamination in residential and school buildings in areas such as Toronto and Port Hope, Ontario.
3. Meeting of January 12, 1979: Section 69 was used twice. First of all, Section 69(1)(d) was applied to minutes dealing with the directions cabinet gave to the Minister responsible for the AECB, the Minister of Energy, Mines and Resources, on how

* It appears that the AECB found the cabinet directives in this area to be rather confusing.

to handle Argentina's nuclear reactor safeguard rules. Secondly, Section 69(1)(g) was applied to material that included a request for two person-years to regulate the licensing of a proposed nuclear ice breaker.

4. Meeting of March 19, 1980: Section 69(1)(f) was applied to part of a Board discussion about the proposed Crown Corporation Act.

All of the Section 69 citations, therefore, related to specific severances of AECB meeting minutes. It is not at all clear to this author why such information should have remained secret.

The AECB meeting minutes from 1975-1983 were also severed 169 times through the citation of Sections 13, 14, 15, 16, 19, 20, 21, 22, 23, and 24 of the Access Act. The severances to these 47 sets of meeting minutes could have been more extensive. Indeed, the AECB's original response to my Access request had been to apply Sections 21 (policy advice) and 27 (transitional period) so as to totally deny me access to all of the 1975 to 1983 Board meeting minutes. *

The information I received has been used in several media stories dealing with the effectiveness of Canada's nuclear safety regulatory program and documenting the various pressures brought against the Board by provincial utilities and the uranium industry.

CASE EIGHT: Trading Arrangements As Confidences - The Case of the Canadian Commercial Corporation

In March 1985 I applied for the minutes of meetings of the Canadian Commercial Corporation (CCC) for the period 1946-1985. This corporation was formed in 1946 to help facilitate export sales to foreign governments and international agencies on behalf of

* The story of the struggle to obtain the AECB, CMHC, Canadian Commercial Corporation and the National Capital Commission's meeting minutes will be more fully reviewed in a report entitled Opening Up the Decision-Making Records of Ottawa's Commissions and Crown Corporations, currently in progress.

Canadian corporate suppliers. Many of these inter-governmental transactions involve the sale of military equipment and CCC claims to have arranged about \$13 billion in sales in the last forty years.

Initially, the CCC refused to grant me access to its minutes but, after I complained to the Information Commissioner and negotiated on my own, I was able to obtain meeting minutes for the 1978-1985 period in January 1986. The minutes were released with extensive exemptions: Sections 15(1) and 20(1)(b)(c)&(d) predominated. *

Section 69 was cited on two occasions to exclude minutes from the meetings held on September 24, 1982 and March 22, 1985:

1. At the CCC's meeting of September 24, 1982, the discussion centred around cabinet communications on risk taking. This was a sensitive subject at the time because private export companies felt that the CCC's entry into projects of this nature as a kind of national trading house usurped their export business. The Department of Finance also worried about the government's liability and public interest critics saw this as further evidence of government assistance to corporate ventures. The Minister of International Trade was present at the Board's meeting when this item was discussed.
2. At the CCC's March 22, 1985 meeting, a cabinet paper that dealt with export financing was discussed by the CCC Board. This cabinet paper apparently advocated a changed role for the CCC, partly against the CCC's wishes.

The impression I gained from reading the minutes that were released to me was that the Canadian Commercial Corporation is poorly managed and it is largely left on its own to handle large contracts. Its political masters rarely intervene to try and point the CCC in the direction of government strategies for international trade, and government officials rarely answered the criticisms launched against the CCC by the private sector. This is a corporation that warrants further scrutiny than it presently receives from either Parliament, the cabinet, or even the media.

* The CCC originally wanted to be excluded from the Access Act, and pointed to the exclusion from the Act of a colleague corporation, the Export Development Corporation to try and make its case.

CASE NINE: The "Vision" of the National Capital Commission

After twenty-five years the National Capital Commission (NCC) is at the crossroads in terms of its mandate to develop the Capital area. The NCC has to contend with rival agencies who would like to see its role either diminished or abolished.

In the period 1985-86, the NCC took an even more aggressive stance under its new Chairman to capture support for its continued role in developing the Capital. Towards this end, it developed a cabinet memorandum on its vision for Canada's capital. This document was also developed, in part, to counteract the Nielsen Task Force's vision of limiting the NCC's future role. It was leaked to the media in March 1986 - some say by its rivals, others say by the NCC itself. *

The NCC has a particular notoriety for being secretive in its dealings with local municipalities and citizens of the capital who are openly "consulted" only when the NCC feels it is in its best interest to do so. It was for this reason that I applied for access to the minutes of full Commission, Executive Committee, and Executive Management Committee meetings.

After negotiations and delays and a Writ of Mandamus, almost one year later, I received these minutes for the period 1978 to 1985. The meeting minutes contained numerous exemptions, primarily Sections 18, 19, 20, and 21. But they also contained some unknown events and decisions such as the implementation of users fees in NCC parks. Some of this data was the subject of a series of stories in the Ottawa Citizen from January to July 1986.

These NCC meeting minutes contained Section 69(1) citations for the following matters:

* Stories and editorials on the NCC vision document were in the Ottawa Citizen on March 12, 13, and 14, 1986. After the document's approval by cabinet in June 1986, only a short summary of its contents was released by the Minister of Public Works, the minister responsible for the NCC.

Full Commission Meetings

- . January 29 and 30, 1983 - discussion of an unidentified cabinet document

Executive Commiteeee Meetings

- . December 5 and 6, 1978 - discussion of the proposed new location of the American Embassy, a controversial matter then as it is now in 1986
- . April 27, 1982 - documents relating to the Daly Building. Public Works saw little future for this downtown building in 1982 but the NCC was interested in it and eventually took over control of the building in 1986
- . August 24 and 25, 1982 - an unidentified cabinet memorandum dealing with property matters
- . October 20, 1982 - a cabinet paper dealing with the mandate of the NCC
- . June 28, 1983 - a document dealing with the future of the NCC
- . August 23, 1983 - data dealing with the Sound and Light show on Parliament Hill, an event run by the NCC that requires cabinet policy input
- . January 10, 1984 - a document dealing with the mandate of the NCC

Executive Management Committee Meetings

- . October 5, 1983 - material dealing with the terrace of the Chateau Laurier, a hotel adjacent to Parliament Hill

The NCC is an agency whose national mandate, in part, requires special cabinet direction. Citing cabinet confidentiality has not, however, been its main rationale for secrecy. Rather, the NCC has cited the discretionary policy advice exemption (Section 21) as its key means of not allowing citizens access to information about its activities.

The National Capital Commission has become reluctant in 1986 to continue providing me with its meeting minutes. It has substituted what it calls records of decisions which contain little or no information about NCC meetings and activities. This matter is currently the subject of complaints I have filed with the Information Commissioner and it will likely end up in Federal Court.

For the most part, therefore, NCC activities related to developing its mandate in conjunction with its Minister and the cabinet still remain secret. The NCC's geographic area includes dozens of area municipalities, two major regional governments, two provinces, and numerous federal agencies. The NCC is a major landowner and landlord as well as an influential planning force in the Capital area. It makes sense, therefore, to allow the public to gain access to information about the Commission.

CASE TEN: CMHC's Plans to Change and Possibly
Privatize Its Inspection Services

In January 1986 I applied for documents related to the Canada Mortgage and Housing Corporation's (CMHC) Work Group on Inspection Services, a task force identified in the Board of Director and Executive Committee agendas in the period 1985-86. Those agendas were obtained in an early Access request, and included an item dealing with the possible privatization of CMHC's inspection services. *

CMHC replied to my request in February 1986 and denied me the records associated with this Work Group on the grounds that CMHC management was still discussing the matter and the information "will be the subject of a cabinet document". It applied the exemptions Section 21(1)(b) and (d) and Section 69(1) to effectively cut off any information on the subject.

* CMHC refused to provide me with the Board and Executive Committee meeting minutes themselves and this is currently part of a Federal Court action (File Number T-1019-86).

CMHC inspection services had previously been subjected to staff cuts; employees did not have a union, nor were they apparently privy to CMHC discussions on the future of inspection services - on the future of their jobs.

The specific documents denied under Sections 21 and 69 were:

- . The Work Group's terms of reference, correspondence, papers, and reports
- . CMHC records of decision numbers 198/85 and 043/85
- . The Work Group's conclusions and recommendations
- . Documents dealing with privatization
- . Assessments of CMHC Inspection Services, 1980-86

This was one of the few cases where the agency claimed all the basic information was unavailable as it was on its way to cabinet, either because it was policy advice or it was already classified as cabinet confidences before going to cabinet. No statement was offered by CMHC to explain why it was not able to sever relevant factual data. Yet page six of the agency's 1985 Annual Report, in a message from the Chairman and Acting President of CMHC, contained a statement that privatization and other options of procuring inspection services in the marketplace had been discussed by the Corporation. A decision had been taken to reject privatization for the time being except for the possibility of procuring appraisal services in the marketplace.

Instead of complaining to the Information Commissioner I chose to try and find out further information by going through the media and the Opposition parties in Parliament. To date, this route has not produced concrete information from CMHC or the responsible Minister, the Minister of Labour.

At stake is the degree of government involvement in housing inspection services in the future and people's jobs, and none of this debate is being conducted in its initial stages in public with parliamentary input or with input from the affected employees.

CASE ELEVEN: The Difficulties of Gaining Information from Treasury Board and Justice Canada on How the Access Legislation Evolved

In 1983 I asked Treasury Board to release the administrative plans for the access legislation it exchanged with federal agencies before the Access Act was proclaimed in 1983. I also requested information from Justice Canada on how the access legislation was first developed. To take Treasury Board's response first, Treasury Board officials argued that the information I had requested constituted cabinet confidences since the draft administrative guidelines for departments to follow in implementing access legislation were part of the records of Treasury Board, which is a cabinet committee. In addition to this, the draft administrative guidelines on access legislation were to remain cabinet confidences even after the refined and approved guidelines were made publicly available by Treasury Board.

After an exchange of letters, Treasury Board officials would only concede that data on the development of the Access Register was not a cabinet confidence and could be made available for a \$300 search and preparation fee (I did not view this data). Yet, despite the fact that I was able to obtain copies of the draft Treasury Board rules for the access legislation from a fair number of other federal agencies, Treasury Board still insisted that these draft rules were cabinet confidences.

The draft rules differed in some significant ways from the published rules entitled an Internal Policy Guide. For example, they proposed charging access users a \$10 application fee and offering a \$50 administrative fee waiver. The draft Treasury Board communication plan on access legislation that I viewed at Environment Canada indicated that the government would not expend much effort to tell Canadians about their access rights and Treasury Board refused to divulge this information as well. Publicity about the proposed high application fee may have contributed to lowering the fee from \$10 to \$5 before the Act was implemented on July 1, 1983.

This was not the end of the matter. After doing persistent battle with Treasury Board, the Board finally conceded to release

other internal implementation reports it developed after July 1, 1983 to convey information and instructions to departments on access legislation. However, Treasury Board maintained that the initial 1984 instructions sent to over one hundred and forty agencies on how to prepare their first annual access reports were to remain cabinet confidences. Many of these agencies found such a claim to be ridiculous because over a dozen of them had already made the instructions available to access users upon request.

Frustrated by Treasury Board's rigid view, this researcher released these 1984 instructions in May 1984 to a parliamentary committee examining access regulations.* They were to serve as a good example of both excessive secrecy and secrecy in administrative rule-making that effects the public's and the access users' right to know. Treasury Board has since decided to make these annual instructions available to the public.

In the same Parliamentary hearing I indicated that Treasury Board had denied my request to have access to comments that officials had made on Opening the Door a Crack (1984) and Prying Eyes (1983), two reports I prepared on the administrative guidelines of the 1982 Access and Privacy Acts. I was denied access to these comments on the grounds that they were cabinet confidences!

I did not use the regular complaint/appeal route under the Access Act to challenge Treasury Board's broad, all-encompassing uses of cabinet confidentiality, but I made sure that this matter was brought directly to the attention of Parliamentarians.

In contrast to the above uses of Section 69, Justice Canada did not claim cabinet confidentiality for comments on my access reports. Justice simply said it had not developed written comments.

Justice Canada also conceded that its original Section 69 claim to deny me access to policy development information on access legislation was not supportable. Although Justice still cited Section 69 in other cases, and applied Sections 13(1)(c) and 14 (provincial input), and Section 21(1)(b) (policy advice) as reasons to keep

* Proceedings of the Joint Committee on Regulations and Other Statutory Instruments, Issue no. 7, May 17, 1984.

some information secret, the data that it did release provided many insights into how the access legislation evolved. Sensitive information on provincial fears about the federal access legislation and federal departmental views on specific sections of the Access and Privacy Acts was not excluded. Granted, this data might not have been presented to cabinet, but it did include some memoranda to and from the Justice Minister. In fact, a fee waiver was granted by Justice Canada revoking the initial \$1000 search, preparation and photocopying fees it requested because the research was seen as being in the public interest.

The Justice Canada data I viewed was, on the whole, much more sensitive than the draft administrative guidelines that Treasury Board continues to classify as cabinet confidences. Draft guidelines directly affect the public and to hide behind the cabinet committee designation to avoid their release puts Treasury Board in the role of hampering a more open access administration. As the coordinating administrator of the access legislation, Treasury Board has set a bad example that, thankfully, other federal agencies have not necessarily followed.

One regulatory reform initiative that has been discussed in Ottawa lately involves allowing public employees to develop and issue certain administrative guidelines without ministerial approval. While this approach may avoid the problem of gaining access to Treasury Board guidelines on access which are considered cabinet confidences, draft guidelines may still not become publicly available. This "solution" does not include any guarantees that the public will participate in the preparation of administrative guidelines, or that the guidelines will be released to the public. *

* In previous reports, Opening the Door a Crack and Prying Eyes, I have advocated the formation of an Access to Information Centre and a Data Protection Board whose terms of reference would include holding public hearings on proposed access administrative rules.

Placing administrative guidelines solely in the hands of public employees, particularly without some form of public scrutiny, also leaves open the risk that politicians may not always act to change heavy-handed rules set by the officials, as they did do when they responded to the public outcry by lowering the proposed access application fee from \$10 to \$5.

CASE TWELVE: The Misuse of Section 69 - Data on
Urea Formaldehyde Insulation Use
in Federal Buildings

This case experience provides a clear example of how claims for cabinet confidentiality can be abused. It shows that the only way such misuse can be corrected is by challenging sweeping claims directly and persistently.

In mid-1983, the Department of Public Works claimed that all of its data on urea formaldehyde insulation (UFFI) use in its buildings was classified as cabinet confidences, primarily on the grounds that the matter was presently before cabinet. After I complained to the Information Commissioner about being denied access to this information, the Minister of Public Works verified this claim for confidentiality in an October 9, 1984 certificate to the Commissioner. The Commissioner then issued a January 1985 report indicating that my complaint was unsupportable as the Minister had certified total exclusion.

The argument I made to Public Works and the Commissioner was that all of the factual and statistical data on this subject could not possibly be considered cabinet confidences. My pleas for the release of safety-related information went unheeded.

It was only after February 1985, when I was in a position to go to Federal Court and I had written to the Conservative Minister of Public Works challenging his claim of cabinet confidentiality, that hundreds of documents became accessible. *

* The Canadian Press wire service published an article on my decision to take the government to court: "Researcher Takes Ottawa to Court Over Information", Globe and Mail, March 13, 1985, page 2.

In April 1985 the Minister of Public Works wrote that his earlier certification was in error, for he should not have said that all of the documents were to be excluded from release. * I was only denied seventy-five documents (some partial and some full) due to certificates that were filed in April and December of 1985 by the Clerk of the Privy Council claiming that these records were cabinet confidences. **

The data that was released after a twenty month delay identified over 130 federal offices and residences as having UFFI, including the Canadian Government Conference Centre. These findings were reported by the local and national media and they proved to be useful to public service unions and groups of UFFI homeowners who were suing the federal government for negligence and damages.

Had I not persisted, the data would most likely still be secret. Unfortunately, there is no recourse in the Access Act for me or others to seek penalties and damages against Public Works.

Both Public Works and the PCO refused to admit in writing that the hundreds of documents I received were never cabinet confidences and that they had been incorrectly classified as cabinet confidences. *** Instead, the Minister of Public Works blamed the error on "administrative oversights" and "the increased activity associated with the change of government". The documents I received did indicate that the certificate of denial signed by Mr. LaSalle had been drafted by

* The October 9, 1985 certificate and the April 3, 1985 letter admitting error are attached as Appendix Seven.

** I found several errors in the first PCO certificate which were pointed out to the Justice lawyer representing the PCO in the Court proceedings. The errors made me believe that such certificates are not totally reliable. Section 23 (solicitor-client privilege) was cited in one instance to deny me access to a letter about a 1984 interdepartmental meeting held at Health and Welfare. The discussion at this meeting centred on the government's legal strategy in anticipation of legal suits by UFFI homeowners.

*** Public Works refused to answer these questions about cabinet confidentiality claims point blank in and out of Court so I applied under the Access Act to try and receive a formal answer but this approach was not successful either.

Mr. LaSalle's Liberal predecessor, Mr. Lapointe. But there has been no direct admission that hundreds of factual documents were labelled cabinet confidences for twenty months based on the reasoning that the matter was being discussed by cabinet. The information that was presented to cabinet or referred to cabinet decisions on the UFFI issue presumably forms part of the seventy-five excluded portions of records or totally denied records. Documents show that as early as February 1984 the PCO was aware of Public Works' claim of Section 69 for all of the documentation. It was not until a year later, however, after I wrote a letter to the Minister, that Public Works requested the PCO's help to identify, exactly, which of the hundreds of excluded records were cabinet confidences.

While I was not fully satisfied that Public Works provided me with all of the relevant documentation, I instructed my Counsel from the Gowling and Henderson firm to discontinue Court action against the department in July of 1986.* In so doing, I was not able to claim damages or penalties against Public Works for delaying the release of safety information for so long, but I did receive disbursement costs and counsel fees from the Government of Canada in an out of Court settlement. This, in my view, was a form of recognition on the part of Public Works that they had erred in withholding releasable records. This access experience provides evidence of how claims for cabinet confidentiality can be abusive as well as illustrating that such abuses will not always be corrected internally without considerable pressure from an outsider.

* Gowling and Henderson had provided me with public interest legal counsel after April 1985 at my request.

CHAPTER III: MONITORING CLAIMS OF CABINET CONFIDENTIALITY THAT ARE MADE UNDER THE ACCESS ACT

One final research project I completed over the last three years was to use the Access Act and other available means of obtaining government documentation to try and find out about the operational use of Section 69 since the Act's proclamation in mid-1983. I set out with the realization that the audit trail of cabinet confidentiality claims would likely be sparse and that much of the data would be unavailable to an outsider. I did not run across any specially prepared government summary assessments of Section 69 use.

SECTION ONE: Available Sources of Information

The information sources I used to review Section 69 usage included:

a) Published Reports

- i) Annual departmental Access Act reports to Parliament, required under Section 72 of the Act for the fiscal years 1983-84, 1984-85, and 1985-86
- ii) The Information Commissioner's annual reports to Parliament required under Section 38 of the Act for the fiscal years 1983-84, 1984-85, and 1985-86

b) Unpublished Data Available Informally

- i) Quarterly and annual statistical reports from Treasury Board on departmental Access Act usage for 1983 through to the first quarter of 1986
- ii) Federal Court case records, including cases filed under the Access Act

c) Access Act Requests

- i) Previous research done by the author on 1983-84 Access Act applications submitted to nineteen federal agencies

- ii) Privy Council Access Act applications from July 1983 to June 1986
- iii) PCO Section 69 Certificates to the Information Commissioner 1983-86, July, 1983 - June, 1986.
- iv) Departmental Section 69 use report forms submitted to the PCO from 1983 to April 1985 *

The above sources do not represent all of the possible public avenues of finding information on Section 69 use. I did not review, for instance, the actual Access applications of each department where Section 69 was cited. This would have made my research prohibitively time consuming.

Not all of the information I managed to collect was easily obtained. It took many months to gather the departmental report forms and some of the departments' earlier Access Act applications. Locating government certificates verifying departmental claims of confidentiality was also difficult. Those filed with the Federal Court under Section 36.3 of the 1982 Canada Evidence Act are not catalogued separately by the Court or the PCO, so I only became aware of four such certificates. ** Those certificates filed with

* Refer to Appendix Eight for samples of these reports.

** The four known certificates filed with the Federal Court - only the last one of which was part of an Access Act application - are:

1. Smith, Kline, and French Laboratories Limited et al versus Attorney General of Canada, Canada Federal Court Reports, 1983, vol.1 IF.C, pp. 917-934 (re: Patent Act application)
2. Best Cleaners and Contractors Ltd. versus her Majesty the Queen (File 1-4417-81) (re: failure to receive a federal contract renewal)
3. The Auditor General of Canada versus the Minister of Energy, Mines, and Resources et al (File T-1401-84) (re: access to PetroCanada/Petrofina Ltd. documents)
4. Ken Rubin versus the Minister of Public Works (File T-450-85) (re: access to documents on UFFI use in federal buildings).

(Technically there were two separate certificates filed in Case 4 but they are grouped together as part a) and b) of one Court action.)

the Information Commissioner, after her August 1984 agreement with the Clerk of the PCO, are difficult to locate because the Commissioner refused to grant me access to these certificates in 1985. * The only way to discover information about such certificates is to either rely on the summaries in the Commissioner's annual reports to Parliament or request copies of the actual certification records from departments known to have cited Section 69. **

I applied to the PCO, which had seven such certificates on file for the period August 1984 to July 1986. An eighth certificate from Public Works was disclosed to me by the Information Commissioner when I requested it in order to help me pursue on my own a Federal Court action against Public Works. I was taking the department to court for failing to disclose data on UFFI use in federal buildings. I also obtained a ninth certificate from the Minister of Transport who claimed that a record dealing with Vfa Rail was classified as a cabinet confidence.

SECTION TWO: Findings

I managed to learn some operational information on Section 69 use from the above-noted sources. These findings are discussed under five headings:

1. Frequency of Use

Departmental use of Section 69 is low statistically in relation to the total number of Access Act applications that were filed. Under 2% of all Access Act applications invoked Section 69 and under twenty agencies at the beginning of 1986 used Section 69. In contrast, close to one hundred federal agencies in this period cited the exemptions Section 19 (personal information), Section 20 (corporate confidentiality), and Section 21 (policy advice) in an average of 13% to 28% of all Access Act applications.

* A government certificate requested by the Information Commissioner can only be filed in Access Act cases when an applicant complains to the Commissioner about Section 69 exclusions and the Commissioner determines, after a private investigation, that requesting a certificate is necessary.

** These annual reports show that the Commissioner received seven certificates during the period up until March 31, 1986. Two more certificates were sent to the Commissioner by PCO that have yet to be reported on by the Commissioner.

The low rate of citing Section 69, however, does not mean that the hue and cry about excluding cabinet confidences from the Act is unjustified. In the first place, the low number of claims for cabinet confidentiality may be due to the fact that many access users, knowing full well that most cabinet documents are excluded from the Access Act, chose not to request access to them.

Secondly, there has been over forty Access Act cases each year in which Section 69 was applied such that documentation was either totally or partially withheld.

Finally, since 1983, over twenty-five complaints about the unfair use of Section 69 exclusions have been filed with the Information Commissioner.

2. Subject Matter

The documentation I viewed revealed that the subject matter of cabinet confidences was very diverse.

The wide range of subjects filed in departmental Section 69 reports to the PCO included agricultural trade negotiations, transborder data flow, fighter aircraft planes, possible nuclear reactor sales, industrial assistance projects, and Dene land claims. In the Access Act applications I reviewed where Section 69 exclusions were claimed, the subject matter included political patronage, the security intelligence service, the 6 and 5% anti-inflation program, the Immigration Act, and the Charter of Rights and Freedoms.

Not all of the subject matter of Section 69 claims can be determined because departments often filed incomplete reports with the PCO during the period 1983 to 1985. Furthermore, some of these reports were subject to claims of cabinet confidentiality themselves.

3. Points of Origin

In the cases where the sender and the receiver are identified in the documentation, it is possible to state that few claims for cabinet confidentiality were made in relation to records prepared by cabinet

members or intended for use by cabinet members. The majority of cabinet confidentiality claims I came across in the existing departmental reports to the PCO, were for documents that senior public employees sent to other senior public employees or their Ministers.

This may indicate that politicians play a relatively minor role in deliberations about matters leading up to cabinet decisions or that public employees are prone to over-categorize documents they prepare as cabinet confidences. It would be worthwhile to find out how much of the documentation distributed among public employees is, in fact, about cabinet decision-making, and how much of the information sent by public employees to cabinet ministers is actually policy advice or simply background data put together under the cabinet confidence label.

4. Certificate Claims

I viewed thirteen formal certificates that were filed with the Information Commissioner and the Federal Court. Eleven were signed by the Clerk of the Privy Council and two were signed by Ministers. These certificates did not contain much information beyond verifying that the documents in question were cabinet confidences. Most certificates did indicate how many documents were excluded under specific clauses of Section 69.

The only government certificate I examined that actually identified details about individual records for which claims of cabinet confidentiality were made, was the certificate filed in the Auditor General Federal Court case dealing with a request for access to documents pertaining to PetroCanada's purchase of Petrofina Canada Ltd. Some individual certificates I viewed did not even identify the subject matter of exclusion. * Certificates are apparently not prepared with public viewing in mind.

In some cases, the documentation indicates that certificates result in the release of records for which the claim of cabinet confidentiality

* I discovered the subject matter of the Finance and Transport Departments certificates because they were cited in the 1984-85 Annual Report of the Information Commissioner.

was originally made. For example, after a complaint was launched, Finance reversed its decision to exclude thirty-three records on the relationship of unemployment insurance to other social security programs. A decision by Employment and Immigration to keep eight records on an unidentified subject confidential was also reversed. In addition to these two cases, in my own application for access to records dealing with UFFI in federal buildings, hundreds of records classified as cabinet confidences only became available once the Clerk of the Privy Council Office's certificate replaced the Minister of Public Works' certificate. In the Best Cleaners case, however, several cabinet documents originally obtained through legal discovery were ruled as inadmissible evidence by the Court after a government certificate was received.

5. Validity of Cabinet Confidentiality Claims

My research uncovered a few cases where an Access Act or Federal Court applicant complained that the exclusion of documents on the grounds of cabinet confidentiality was far too broad. It is not possible, however, for an outsider to clearly document how many original, broad claims for cabinet confidences were questioned internally (particularly by the PCO) before they reached an appeal stage.

In the twenty-six complaints summarized in her last three annual reports, the Information Commissioner has supported in full the government's claims for cabinet confidentiality in all but four cases. In these cases, the Commissioner helped the applicants obtain some of the documents originally labelled excluded confidences. The Commissioner rarely deemed it necessary to request a government certificate verifying that data fell under Section 69(1); she was usually satisfied that the data she could not view qualified as excluded cabinet confidences.

My Federal Court action against Public Works is the only Access Act appeal I know of where the act of filing a Court action provided the bargaining strength from which to negotiate the release of documents that had been labelled cabinet confidences. The Federal Court was not asked to rule on my initial application in this case because many records were released to me and the Court did not really have jurisdiction under the Access Act to rule on abusive claims for cabinet confidentiality or to penalize agencies that were guilty of abuse.

SECTION THREE: Limits to the Independent Evaluation of Section 69 Use

No official source will try to make it easier to potentially identify the specific nature of cited cabinet confidentiality exclusions. The available government information on Section 69 use is notably sparse and, at times, inconsistent. Through cross-checking, for example, it became evident that there were some discrepancies between the reported use of Section 69, as recorded in departmental reports to the PCO, and the actual use of Section 69, as revealed in departmental Access Act case files. It is also possible that some of the Section 69 citations I reviewed could turn out to be ill-founded claims.

One source for finding out about cabinet confidentiality claims has been largely discontinued since mid-1985. Departmental report forms to the PCO are no longer required although they are supposed to be prepared under the terms of an August 30, 1983 Treasury Board directive on cabinet confidences. The reason for discontinuing the report forms was not made official until a June 4, 1986 Treasury Board directive revised the earlier guideline. The revised 1986 directive requires departments to submit to the PCO for review each individual record that the departments wish to claim as excluded cabinet confidences. Previously, departments only had to have their legal advisors consult the PCO Counsel if they had problems assessing whether a record should be an excluded

cabinet confidence. With the present central review of each Section 69(1) case, the PCO sees no reason to keep accessible report cards on each cabinet confidentiality claim. Furthermore, the PCO knows that it does not have any statutory obligation to prepare publicly available reports. When I requested information on whether the PCO would continue making such data available under the Act, the PCO replied in August 1986 that such records no longer existed "under the control of this institution which replaces the report form in recording individual departmental Section 69 usage". I did learn, however, from the PCO that letters sent to departments by the PCO in each case confirming documents as cabinet confidences would not be made available under the Act. Those letters, I am told, contain little information about the subject of such claims. They are similar to certificates in that they merely verify documents as cabinet confidences.

The new Treasury Board directive of 1986 was produced because the PCO was concerned about the departmental practice of abusing Section 69 claims in cases like the UFFI access case. The PCO's desire for consistency in departmental claims for cabinet confidences, however, may translate into less flexibility for some departments as they release information. This is likely, given the PCO's tendency to classify as confidences any records that reveal information about confidences. The new directive may also cause delays in applicants' receipt of replies unless the PCO's Counsel Office plans to significantly increase its staff charged with reviewing cabinet confidences. Apparently, the PCO had informally requested departments to follow the new practices outlined in the June , 1986 Treasury Board directive over a year prior to its finalization and the directive becoming publicly available.

The new policy means that applicants with complaints about departmental Section 69 citations should name the PCO as one agency in their complaint. It may mean that Ministers of the Crown no

longer have hardly any real discretion when it comes to deciding which of their cabinet confidences are disclosable under the Act. In practice, some departmental records may, for purposes of disclosure, actually become under the control of the PCO.

My experience in trying to monitor Section 69 use has helped to show that there are extremely limited possibilities of doing objective, independent evaluations of such usage and, in the future, hardly any information on Section 69 use will be made available to the public. The existing Access Act does not even require the Information Commissioner, on behalf of the public, to audit individual cabinet confidentiality reports.

The only way to ensure that Section 69 is applied properly by government agencies is to allow external judicial reviewers, independent of departments and the Privy Council Office's reviewers to examine cabinet confidentiality claims for non-disclosure and to investigate and hear complaints about excessive cabinet secrecy.

CHAPTER IV: IMPROVING ACCESS TO CABINET RECORDS UNDER THE ACCESS ACT

SECTION ONE: General Observations

One of the most controversial eleventh hour changes that was made to the Access Act in 1982, after public hearings were held, was the exclusion of most cabinet confidences from the list of accessible information under the Access Act. It was thought to be too risky to leave cabinet records as an exempt category of information subject to judicial review because the principle of cabinet solidarity might be placed in jeopardy by an outside review force if it ordered the release of full and frank cabinet deliberations.

The PCO's 1986 submission to the Parliamentary access review committee entitled Operations of Council and Cabinet, continues to stress that cabinet confidences are required to protect cabinet unanimity and collective responsibility. Very few proponents of greater access to cabinet records would quarrel with the need for some cabinet confidentiality. At issue, however, is the degree of confidentiality that is required and the length of time that is needed to keep these records secret.

I firmly believe that there are far too many cabinet confidences. In particular, too many cabinet records that contain mostly factual data are labelled as cabinet confidences. An important step toward reducing the number of confidences in the future would be to prepare cabinet records more clearly and efficiently with a mind to separating the factual data from the political analysis and recommendations. A December 30, 1985 News Release from the Minister of Justice, John Crosbie, stated that as of January 1, 1986 "about 80% of the information placed before cabinet" was factual in nature rather than politically sensitive. But as it now stands, no cabinet confidences after mid-1984, regardless of how much factual or routine information they contain, are available under the Access Act for twenty years.

It was therefore a hopeful sign when Crosbie recognized this problem of not being able to gain access to the factual data in cabinet records in two separate statements on December 30, 1985.

Crosbie publicly stated that Cabinet had passed an Order-In-Council (PC 1985-3783) on December 27, 1985 which would allow the Auditor General to gain access to cabinet and Treasury Board submissions, background data in cabinet memoranda and discussion papers, and final decisions of the cabinet and Treasury Board, beginning in January 1986. *

In another instance on May 8, 1986, while appearing as a witness in front of the Justice Committee review hearings on the Access Act, Crosbie indicated his own willingness to consider having the policy of severability apply to cabinet confidences so that the non-sensitive, non-political data could become disclosable to the public. This stance was not proffered to the Justice Committee as official cabinet policy, but it was a significant development because Crosbie was the Minister responsible for considering Access Act changes at that time.

I believe that there are at least five major factors which help explain why Crosbie and the Conservative Cabinet may have moved in the direction of wider access to cabinet confidences and why greater movement might take place in the future.

The most obvious reason for the policy shift was the desire to try and meet the Auditor General half way in his request for access to cabinet confidences so that he could do his job of auditing public expenditures. The Auditor General brought the issue to a head through a 1984 Federal Court action. He wanted to obtain cabinet documents that he thought would shed light on the PetroCanada/Petrofina deal of the early 1980's. Prior to his Court action, the Auditor General had been blocked by government officials and Prime Ministers for many months in his request for these cabinet confidences. The Auditor General's determination, the 1985 Federal Court decision that was in his favour, and the great deal of public attention he attracted, had the significant effect of forcing the current Government to begin reviewing the concept of access to cabinet confidences.

* Related cabinet orders-in-council also gave the Auditor General access to specific earlier factual documents on the PetroCanada/Petrofina case. However, the Auditor General was not given general retroactive access to the political cabinet confidences prior to January 1, 1986 and until the government appeal of the 1985 Federal Court decision is settled, he does not have access to PetroCanada/Petrofina documents.

Indeed, it is fair to say that the most important challenge to the existing system of cabinet confidentiality since the passage of the Access Act has come from outside the Access Act system and inside the Office of the Auditor General. It is still too early, though, to determine whether the Auditor General will be satisfied with the degree of access he has gained to certain cabinet records after January 1, 1986, or whether in fact he will gain access to all of the categories of cabinet confidences listed in the Order-in-Council PC 1985-3783. *

A second motivation for change may have been the Conservative Party's promise, while it was in Opposition, to bring back judicial review of cabinet confidences. This promise reflected a desire on the part of the Party to reassert political authority and cabinet power at a time when the power and influence of the senior public service in Ottawa was very strong. The Conservatives recognized that the trend toward establishing more cabinet confidences had at times more to do with protecting the anonymity of senior public officials than the unanimity of politicians. The Conservative government has so far faltered in keeping its promise but the three year review of the Access Act presently underway provides ample opportunity for it to finally take decisive action.

In the third place, the desire to separate the factual data from political confidences comes from within certain factions of the senior public service. The motivation comes from self-preservation and a desire for greater administrative efficiency in the growing cabinet paper system.

* The August 1986 PCO instructions on how to prepare cabinet memoranda warn that the Auditor General may seek to review and may be able to have under certain conditions the analysis or non-political section of the memoranda that deal with expenditures of public funds "to determine that full value was derived from the money spent". Departments are instructed to refer all Auditor General requests for access to such cabinet records to the PCO.

The PCO's revised instructions of 1984 and 1986, designed to help reinforce to departments how to prepare records for cabinet, reflect this motivation by recognizing, formally, the need for better separation of factual and political data. The instructions to departments request that the analysis or non-political section of cabinet memoranda written by public employees be separate from the ministerial recommendations or political executive summary written by Ministers and intended for their colleagues. *

As well, the August 1986 instructions distinguish components of a public communications strategy section to accompany the analysis and ministerial recommendations section. An advisory note component written by the political exempt staff of the Minister assesses the political implications of the proposed public communications synopsis and plan written by public employees.

Not to be underestimated, however, is the propensity of officials to resist greater public access to the factual data found in cabinet confidences. Many new confidences have been created with the advent of a larger cabinet committee system. Guarding cabinet secrecy is the natural tendency of the Cabinet Secretariat and the Prime Minister.

Translating greater access to cabinet confidences of a factual nature into a threat to the very future existence of cabinet as the executive branch of the Canadian government is not, however, a position that all senior government officials accept as warranted. Officials in some quarters of the government recognize that cabinet business could still be conducted in secret without any serious danger that politically sensitive cabinet records would become immediately disclosable. Greater access to cabinet records would mean, at the most, opening up the cabinet process to greater public scrutiny and hopefully, greater public awareness. **

* I believe that cabinet and cabinet committee memoranda before 1984 should still be severable if they included separate sections for background data and recommendations as dictated by the earlier 1977 PCO instructions.

** The political and legal basis behind the Canadian cabinet system and its reform deserves further study. Little research has been done on this subject and most of it has been done by people close to the cabinet process who favour the status quo.

Another factor influencing movement in the area of cabinet confidentiality reform has been public pressure and media attention on the issue. This pressure has been a constant barb in the side of those in authority, even though some media pressure has served mainly to retrench the forces advocating the status quo. Sometimes the media in its editorials and coverage plays up the position that goes beyond advocating greater access to cabinet records and presents the viewpoint that nothing less than the end of all cabinet secrecy and basic changes in the nature of the cabinet system will suffice. Most of the media coverage since 1983 has however been restricted to reports and commentaries favourable to the principles of severing and/or reviewing cabinet confidences.

One final factor that may influence change is the potential power to review cabinet documentation that the 1982 Canadian Charter of Rights and Freedoms confers on the courts. All of the facts and opinions considered by cabinet as it makes decisions could become subject to court review on constitutional grounds.

A May 1985 Supreme Court ruling that rejected Operation Dismantle's bid for an injunction to prevent cruise missile testing on Canadian soil involved a review of a decision of the Governor in Council to see if constitutional rights were violated, but the case did not involve actually reviewing cabinet documents. Making cabinets duty-bound to act in accordance with the Charter will certainly lead to further court actions and quite possibly this will mean that the courts will end up reviewing specific cabinet documents in certain circumstances.

Under the Access Act, or in most other circumstances, courts can now only receive government certificates that are filed under the terms of the 1982 Canadian Evidence Act to verify that the documents being withheld are cabinet confidences. If, on constitutional grounds, the courts could eventually obtain cabinet confidences relevant to the cases being heard, this would be a strong argument in favour of their availability to the courts for review in other cases, including access cases when applicants are being denied such government information.

In its initial 1985 ruling in the Auditor General case (Court File Number T-1401-84), the Federal Court noted that the access legislation confirms and extends the exclusion of most cabinet confidences from review by the Courts and Members of Parliament, and disclosure to the public. * The Federal Court, however, has not expressed an opinion on the need to change its role in dealing with issues of cabinet confidentiality which, at present, is very limited if not non-existent.

The Information Commissioner has also been fairly silent on the issue of whether cabinet confidentiality restrictions are needed. The closest the Commissioner has come to expressing an opinion on the matter was when she was pressed to do so during her May 14, 1986 testimony in front of the Justice Committee reviewing the Access Act. The Commissioner, without providing any details for reform, stated that the inclusion of cabinet confidences within the purview of the Act might lessen public cynicism.

The most immediate problem in trying to implement some program of gaining greater access to cabinet confidences will be the matter of trying to sever past cabinet confidences. In his December 1985 News Release, Crosbie recognized that it may be difficult to sever records that contain "a mixture of political and financial material that cannot be taken apart". Some past cabinet confidences will likely lend themselves more easily to severances than others. An independent review should be undertaken in cases where severances and claims of cabinet confidentiality are disputed. A costly line by line review towards severance can largely be avoided in the future if the government takes more time to direct and require its agencies and departments to prepare the factual data separate from the political data in any records that are destined for cabinet or are in reference to cabinet proceedings.

* The same judgment noted that the Privacy Act (Section 70) and the Canada Evidence Act (Section 36), passed at the same time as the Access Act, both exclude cabinet confidences from disclosure and the Canadian House of Commons Standing Orders also include a similar restriction.

All that is needed now is the political will to open up the cabinet information system to greater public access. The Conservative Government, while in opposition, made a promise to bring back judicial review of cabinet confidences. In addition to providing for judicial review, it would be a major achievement if the government could manage to formally acknowledge that the factual information contained in cabinet records should be accessible to citizens at an early stage, while the ten year hold of secrecy on cabinet confidences should be reserved strictly for politically sensitive cabinet records. It appears likely that the Justice Committee reviewing the Act may recommend changes along these lines. Certainly, the time is ripe to make these changes to enable broad access to cabinet confidences.

SECTION TWO: Proposals

The key to narrowing the breadth of claims for cabinet confidentiality is to exclude factual information from the definition of a cabinet confidence and at the same time, apply the principle of severability to the cabinet paper system. In this way, factual information sent to cabinet could be severed from political considerations and recommendations. Indeed, a revised Access Act should formally require that officials separate the factual data in cabinet records from the political data.

Implicit in this change is the recommendation that judicial review should apply to cabinet confidences since they would become exemptable rather than excluded records. Such an independent review could assess any severances that are made and pass judgment on any remaining claims for cabinet confidentiality. As the situation now stands, the Information Commissioner and the Federal Court can only receive government certificates verifying that records are cabinet confidences. In order for the two-tier review process to be meaningful, a full scale comprehensive de novo review would be necessary. It would be insufficient for the judiciary to simply hear arguments about whether the agency had authority on "reasonable grounds" to make its claim of cabinet confidentiality. The Federal Court should be able to order the release of improperly withheld records and penalize agencies when they abuse the right to claim cabinet confidentiality.

Much more needs to be done, however, in addition to ensuring that cabinet confidences become subject to judicial review. The actual definition of cabinet confidences should be narrowed so that it only includes what I call the political records of cabinet. These are:

- . Cabinet and cabinet subcommittee minutes
- . Inter-ministerial correspondence concerning cabinet or cabinet committee deliberations
- . Political, ministerial memoranda to cabinet *

This proposal to limit the very nature of cabinet confidences is a necessary alternative to retaining a broad definition of cabinet confidences subject to severability and judicial review. Its adoption would mean that most non-political cabinet records such as discussion papers and most cabinet housekeeping records such as cabinet agenda items and records of cabinet decisions, would no longer have cabinet confidence status. The onus would be on the government to prove that they should be kept secret rather than have them treated as confidential automatically.

Complementary to narrowing the definition of cabinet confidences is the need to shorten the period that absolute confidentiality can be claimed. I propose, at the most, a ten year exemption period. Yet, factual data sent to cabinet should be released immediately after cabinet considers it, and exemptable cabinet confidences, particularly summaries of political discussions, should become accessible sooner than ten years, under certain conditions:

- . When cabinet makes a discretionary decision to do so
- . When cabinet issues a press release or publicizes the decision

* The political data found in cabinet memoranda prior to January 1, 1987 should also be considered confidences but not their factual content.

- . If release of the information would not be injurious to international affairs or defence, as defined in Section 15 of the Act *
- . If pressing environmental, health, safety, and civil liberties issues are involved **
- . If criminal evidence warrants a review of cabinet documents ***
- . If a royal commission, committee of inquiry, or the Auditor General, needs cabinet confidences to conduct their reviews ****

In the past, the very few early releases of what are termed excluded cabinet confidences not normally disclosed by cabinet or individual Ministers have been the result of political pressure and expediency. These cases include the cabinet documents released in the Coalgate Affair involving an ex-Minister's contract with his former department; the release of some cabinet documents to the McDonald Commission on RCMP wrongdoing; and the consideration given to granting the Auditor General greater access to PetroCanada/Petrofina cabinet records.

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- * It would defeat the purpose of earlier release if nearly every cabinet matter was considered a "national security" situation.
 - ** Decisions related to the use of UFFI in buildings should be included in this definition; so should matters such as nuclear accidents, toxic chemical waste discoveries, disease epidemics, and decisions where constitutional rights are suspended.
 - *** Police, investigative, and security forces should not go on "fishing expeditions". Their review of cabinet documents should be by court orders only. Current legislation forbids any review of cabinet documents by law enforcement agencies.
 - **** Cabinet documents were released under Order-in-Council 1979-887 to the Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police. The Trudeau Government allowed the release of handwritten notes of an official who was taking the minutes for a cabinet committee on intelligence and security. This was done partly to answer allegations by the former director of the security service that Ministers had been given enough information to suspect that the Mounties might be conducting illegal activities. This Commission reviewed the problems of RCMP wrongdoings several years after the alleged events had taken place. The situation may arise, however, when commissions of inquiry require access to the most contemporary cabinet records.

Changing the definition of cabinet confidences and specifying conditions for early release will likely meet with great opposition from senior officials, much more so than applying the severance principle to the broad, existing categories of cabinet confidences. But the proposed changes are necessary to implement; far too many documents are presently stamped cabinet confidences simply because they may end up at the cabinet discussion table, regardless of whether cabinet Ministers have affixed their signatures and/or recommendations to the documents.

Some of the recommendations discussed below may meet with even greater resistance because they imply that the largely unwritten Canadian constitutional convention of an executive cabinet should be more precisely defined by legislative statutes. * In conjunction with adopting more useful record-keeping practices for cabinet records, officials must also be held more publicly accountable for the way they develop cabinet papers and then categorize these records as confidences. ** The task of holding them accountable should not be left exclusively to the discretion of the Prime Minister and his officials from the Prime Minister's Office or the PCO. There needs to be a clear set of public guidelines and conditions.

The end result would be a more efficient internal management system for cabinet records. In addition to this, the public would gain greater knowledge of the nature of the cabinet record-keeping

* I would argue that by defining cabinet confidences in Section 69(1) in terms of specific record categories in the Access Act, and by defining in Section 69(2) the Queen's Privy Council for Canada to include cabinet and committees of cabinet, the process of giving cabinet a legal existence and status has already begun. The 1986 Privy Council paper, Operations of Council and Cabinet presents the view that cabinet has no legal existence (just the Queen's Privy Council for Canada or the Governor-in-Council) and "as a result, cabinet procedures are not reviewable as they have no legal status or outcome.... The exclusion of confidences of the Queen's Privy Council for Canada from ... (the Access to Information Act) is evidence of the legislature's understanding that the executive power is separate from the legislative power and therefore Parliament ought not to attempt to regulate the operations of cabinet".

** The current Prime Minister, for one, given the sloppy manner in which some of his hotel expenses have been released under the Access Act, should appreciate the need for upgrading record-keeping and retrieval practices.

system. Greater care would be taken to preserve this part of our history. There would also be greater chances of public access to well-prepared, easily located cabinet records.

For people interested in historical or public policy analysis, it would be extremely useful to have all types of relevant cabinet documents readily available and prepared without the need to apply under the Access Act and incur time delays and costs. How a cabinet decision was argued, presented, and conceived in draft legislative terms may be just as important to a recipient as a list of policy options presented in a cabinet memorandum or a summarized distillation of what was recorded as a cabinet decision.

While the PCO is preparing to enter further into the age of modern, computerized record-keeping systems, it still does not have sufficient control over or coordination with departments when they register cabinet records. The proposed changes to the system of cabinet record keeping can benefit the Prime Minister and his officials by ensuring that they do not lose control over the vastly increased number of cabinet documents coming from departments.

Finally, as my own experience indicates, without ready availability and efficient retrieval of cabinet records, it would be extremely difficult to obtain cabinet documents in expeditious ways. The public perception is that cabinet confidences are easily retrieved after the twenty year exclusion period because special care and security measures have been taken to keep these records in super efficient storage. This misconception is partly reinforced by the fact that each January there are usually many media accounts of thirty year old cabinet meeting minutes that have been made available at the Public Archives. Unfortunately, under the existing Access Act and record-keeping practices, it could be very difficult to locate many other cabinet records and it is often prohibitively expensive to prepare them for disclosure.

In order to facilitate a better cabinet record system the following changes are suggested:

1. All verbatim cabinet discussions and decisions must be permanently recorded by law along with summaries

2. The existence or discontinuance of all cabinet records, and their retention schedules, should be publicly known via published order-in-council regulations tabled promptly in the House of Commons by the Prime Minister
3. Indexes should be kept on cabinet records and they should be made available to the public right after the documents have been prepared and discussed by cabinet
4. Cabinet and cabinet committee meeting records should be prepared and made available to the public automatically after ten years, rather than thirty years as is now the case
5. Inter-ministerial correspondence on cabinet deliberations and political, ministerial memoranda to cabinet should become available upon request at least after ten years under a revised Access Act.

There has to be a better communications system in place to actually ensure that disclosable cabinet records are accessible to the media and the public at various locales. As already suggested, cabinet and cabinet committee agenda records should be made available automatically within a week after these bodies meet. Similarly, records of cabinet decisions should be made public routinely. The public would also benefit by the early release of more draft legislation and regulations. Only those few agenda items, decisions, and legislative proposals of a super-sensitive nature should be withheld for up to ten years subject to judicial review.

I also advocate that discussion papers should be used again as a cabinet public information tool to enable factual data to become available on a routine basis disclosable even before cabinet reaches a decision. As well, cabinet memoranda (but not the accompanying political executive summaries) should be made publicly available immediately after cabinet reaches a decision.

In some respects, the Access Act has deterred a greater release of cabinet records and has created many formalities in the system of gaining access to cabinet records. It would be far simpler to go to designated places and view already prepared cabinet documentation. The executive branch of the Canadian government appears to becoming more aware of the need to communicate with the public about its operations. As yet, however, revising the Access Act to ensure the greater disclosure and availability of cabinet records has not yet become one of the avenues, as it should be, for creating a comprehensive cabinet communications policy that truly seeks to interface with the public.

SECTION THREE: Epilogue

By trying to obtain specific cabinet confidences, and trying to review claims for information denial, I have gained some insight into the problems associated with the Access Act and its provisions for excluding most confidences from public scrutiny.

I have tried to show concretely that the system of establishing, recording, and storing cabinet confidences is far from perfect. In particular, the decision to allow cabinet confidences to include so much factual data and the mixing of political and factual data has worked against the public's right to know.

Trying to correct some of the abuses I have observed related to applying claims for cabinet confidentiality will not be credible without a system of auditing or independently reviewing confidences. Applying cabinet confidentiality to very broad categories of records as a means of protecting the future of the cabinet system is no longer an acceptable position.

It is quite revealing that I managed to obtain very sensitive data, such as the minutes of four airforce base meetings on the safety of their nuclear airborne weaponry, from general departmental records, but I was denied access to rather ordinary draft plans for publicizing the Access Act on the grounds that they were cabinet confidences. * The true spirit of the Access Act implies that factual data should be released regardless of whether it was intended for cabinet or not.

The twenty year old cabinet confidences I viewed and the disclosable discussion papers I received were predominantly factual in nature without any hints of political disagreements by cabinet ministers. Such cabinet records should be released within a very short time span after they are written. As well, greater efforts should be made to sever factual data from legitimate political confidences and to prepare cabinet records efficiently with this and the public interest in mind.

The existing limited access to cabinet confidences and the lack of care in preparing cabinet records for consideration by the cabinet and eventually the public, has to be challenged and changed. My efforts have hopefully contributed to improving these matters. I am glad that I have had the opportunity to express my concerns at parliamentary hearings, public meetings, and appeal proceedings, and now, in this report.

Revising Section 69 is the key to restoring the credibility of the Access Act. The principle of open government is not served well by excessive cabinet secrecy. The opportunity for change exists with the current Parliamentary review of the Access Act. Changing the conditions of access to and review of cabinet confidences should be negotiable, like other reforms to the Access Act. Cabinet solidarity will not crumble and parliamentary democracy and ministerial responsibility will be improved if the public has a greater knowledge of cabinet affairs. No area of exemption or exclusion should be deemed sacrosanct and above thoughtful reconsideration.

* These examples were cited in a Globe and Mail article, "The Struggle to Lift the Veil of Secrecy Worn by Cabinet", December 13, 1984, page 7.

Examples of Cabinet Confidences which are Accessible Under Section 69(3) of the Access Act

Provided are sample pages obtained under the Access Act of a cabinet meeting agenda, a cabinet meeting minute, referring to two separate issues discussed at cabinet. Also, provided are two sample pages of departmental discussion papers, one with exemptions applied; the other with a Section 69 citation.

An Example of a Cabinet Agenda and Specific Meeting Minute

NOV 3/55

Items Discussed

- Reception at Russian Embassy; attendance by Ministers 2.
- Legis; Canadian Farm Loan Act amendment 2.
- Legis; Canada Shipping Act amendment 4.
- Legis; National Harbours Board Act amendment 6.
- St. Lawrence project; regulation of water levels 7.
- Deep-sea shipping 9.
- Prince Rupert, B.C.; proposed construction of airport 13.
- Advances on farm-stored grain 14.
- Widening of Carling Avenue; a request from Ottawa for a part of Experimental Farm property 15.
- Royal Agricultural Winter Fair, Toronto, Ontario; financial assistance for additions to Coliseum 17.
- Great Seal of Canada; submission of new design to Her Majesty 18.
- Radio broadcasting licence, London, Ontario 19.
- Appointments 19.
- Ministerial appointment 20.
- By-election; issue of writ 20.
- Trans-Canada pipe line 21.

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CANADIAN ACCESS TO INFORMATION
ACT

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VIRTE DE LA LOI CANADIENNE SUR
L'ACCÈS À L'INFORMATION.

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appearing on this record the informa-
tion contained herein is no longer
classified.

Nonobstant toute cote de sécurité
figurant sur ce document, les ren-
seignements qu'il contient sont désor-
mais considérés comme non-classifiés.

NOV. 3, 1955

TOP SECRET

- 2 -

Reception at Russian Embassy; attendance by Ministers

1. The Prime Minister said he, and presumably other members of the government, had received invitations to attend a reception at the Russian Embassy the following Monday on the occasion of the anniversary of the October Revolution. He had not attended any function at the Russian Embassy since 1949. However, it was now felt, in view of the somewhat changed international climate, that as Prime Minister he might properly attend the function, together with two or three other Ministers.

2. The Cabinet agreed that the Prime Minister, the Minister of Trade and Commerce and two or three other members of the government would attend the reception at the Russian Embassy the following Monday on the occasion of the anniversary of the October Revolution.

March 12th, 1964.

ITEMS DISCUSSED

Cyprus
Norwegian expedition at Alert base
The Budget
Purchase of C130E aircraft
Export credits; application for Tuxtepec Paper Mill,
Mexico
Export credits; application from de Havilland Aircraft
of Canada Limited
Low-cost imports
Medical services for veterans
Development of transportation facilities in North Gaspé
Inter-Governmental Committee on European Migration
→ Social Insurance Number
Naval support for scientific expedition to Easter Island

SECRET

- 10 -

MAR. 12, 1964

Social Insurance Number

The Minister of Labour said that the re-registration of the labour force using the new social insurance number would be starting shortly. This registration would be made under the authority of the Unemployment Insurance Act and would therefore be limited in its compulsory effect to the insured population of some 4½ million. Until the Canada Pension legislation came into force there would be no authority to require the registration of others. The possibility of taking authority under the Income Tax Act had been discussed with the Minister of National Revenue but it had been agreed that this should not be done. The only alternative course seemed to be to invite other members of the public to register voluntarily for a social insurance number, and Mr. MacEachen proposed that an invitation to this effect should be included in the publicity issued in connection with the re-registration for unemployment insurance purposes.

The Prime Minister said that nothing should be said in the publicity that would suggest that the government was requiring any action by the public in anticipation of a legislative measure not yet passed by Parliament. There should therefore be no suggestion of any obligation to register.

The Cabinet agreed that, following consultation with the Prime Minister, the Minister of Labour should include in the publicity relating to the re-registration for unemployment insurance purposes an invitation to members of the public not covered by unemployment insurance to register voluntarily for their social insurance number.

Page 1

SECRET

~~CANADIAN EYES ONLY~~

CANADIAN POLICY TOWARDS CUBA EA-8-78 DP

1. The purpose of this paper is to examine {

Exempt s. 15 (1)

} our policy towards Cuba.

1. Cuba's relationship with the Soviet Union

2. Cuba has enjoyed close and stable relations with the Soviet Union in foreign, military, party, intelligence and economic affairs since the late sixties. The economic relationship has been of vital importance to Cuba. Since 1961, the Soviet Union is estimated to have provided Cuba with \$9.9 billion in non-military aid. Of this total, loans at concessional terms are estimated to amount to \$4.6 billion, while the remainder have been grants. The Soviet Union's subsidies to Cuba in 1978 are expected to reach \$2.3 billion, which is more than a quarter of Cuba's estimated GDP for 1978 of between \$8 and \$9 billion.

3. The Soviet Union's military assistance to Cuba has also been important. {

Exempt s. 15 (1)

4. The exact degree of Soviet influence on Cuban policy is a matter for speculation. {

Exempt s. 15 (1)

} The relative strength of the Cuban position appears to be due to President Castro's personality and the political importance of Cuba to the Soviet Union. While Cuba has supported the Soviet Union since the late sixties on foreign and party matters of particular interest to the Russians, it has shown considerable independence and initiative within certain broad limits on Third World matters.

5. Since 1975, Cuban and Soviet policies in Latin America and Africa have become increasingly complementary. Nevertheless, it is our view, {

Exempt s. 15 (1)

} that in neither region are the goals and the policies of the two countries identical. The most obvious examples of Cuban and Soviet cooperation have been Cuban intervention in Angola and Ethiopia. {

Exempt s. 15 (1)

}

{ Exempt s. 15 (1)

*Excluded in accordance with
sections 69.0)(d) and (g) of the
Access to Information Act.*

Discussion of Alternatives

18. Four alternative methods of dealing with the Petro-Canada privatization issue have been identified for analysis. These alternatives have been selected to identify the significant legal and financial consequences of major potential decisions and to permit a crystalizing of the significant policy issues.
19. The four alternatives are listed below before being discussed in more detail. A more intensive discussion of the legal and financial implications of each alternative has been included as an appendix and only the highlights are discussed within the main text of this memorandum. The alternatives are:
 - i) full windup by selling all assets
 - ii) sell all equity or as much as market is capable of absorbing at "fair" prices
 - iii) maintain the status quo with certain changes which, while not designed to fundamentally privatize, will alleviate several of the principal concerns about Petro-Canada held by both the private sector and the government
 - iv) segmentize and partially privatize by disposing of certain assets including certain portfolio investments (Westcoast Transmission) and/or profitable assets (Syncrude, the Taylor Refinery, the Cochin Pipeline etc.)

from 1969-1979

- Produced on June 18, 1980

June 16, 1980
le 18 juin 1980

STATISTICAL COMPARISON FOR CABINET OPERATIONS
FOR 1969 TO 1979/COMPARAISON DES STATISTIQUES
SUR LES ACTIVITES DU CABINET POUR LES ANNEES
1969 A 1979

	1969	1970	1971	July 1971 1972/ Juillet 1971 1972 *XX	1973	1974XX	1975	1976	1977	1978	1979XX
Memorandum to Cabinet Mémoires au Cabinet	784	781	829	767	683	611	634	494	493	483	635
Discussion Papers Documents de Travail	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	292	226	249
Draft Bills Avant-Projets de loi									57	89	68
Committee Reports Rapports de Comité	487	716	593	620	628	668	647	607	657	656	595
Cabinet Meetings Réunions du Cabinet	73	77	75	75	58	57	57	64	62	56	75
Committee Meetings Réunions de comités	369	350	285	230	218	257	283	257	272	207	206
RDs for Items on Agenda/RD publiés pour des questions qui figuraient à l'ordre du jour	284	339	409	432	272	274	267	319	335	340	257
RDs for Items not on Agenda/RD publiés pour des questions qui n'étaient pas à l'ordre du jour					88	83	117	116	430	99	108
RD(C) Confirmations	314	410	346	347	357	430	416	266	265	292	350
Total RD + RD(C)	598	748	755	779	717	787	800	701	730	731	607

RD - Record of Cabinet Decision/
Rapport de décision du Cabinet
RD(C) - Committee Report confirmed by Cabinet
Rapport de comité approuvé par le Cabinet

* No statistics kept for the calendar
year 1972
• Aucune statistique n'a été établie
pour l'année civile 1972
XX 1972, 1974 &
1979 were election
years/1972, 1974
et 1979 étaient de
années d'élection

Appendix 3 A 1980-81 PCO Survey of Discussion Papers That
Departments Claimed Were Made Public

A survey of discussion papers made public by departments between July 17, 1980 and February 28, 1981 was undertaken by telephone by the Communications Secretariat of PCO and was based on information provided by departments. The original PCO list obtained gave the names of contact people in departments to obtain the listed available discussion papers. I have left out these contact names, some of whom are no longer the appropriate departmental contacts. As well, I have rearranged the dated discussion papers by departments.

While the list has been challenged for its accuracy by departments like Justice, PCO's response is this is what departments told them at the time of compilation in 1981. Interested parties should contact each department's information services to check if in fact the listed discussion papers were publicly released and are still available. I have marked with an asterisk papers not viewed.

Agriculture Canada

Amendments to the Pest Control Act 8-80DP

Fruit and Vegetable Storage Construction Financial Assistance Program 9-80DP

Seed Potato Sector 10-80DP

Financing Alternatives for Canfarm Cooperative Services 21-80DP

Canada Mortgage and Housing Corporation

- * The Community Services Contribution Program 5-80DP

Communications Canada

Office Communications Systems Programs 5-80-DP (with ITC)

Comptroller General

- * Revisions to the Estimates 12-80DP

Economic Development

- * Improving the Organization and Delivery of Business Assistance Programs 1-80DP

Environment

- * Additional Funding for the Parks Canada Capital Budget 5-80DP

Indian Affairs and Northern Development

Indian on Reserve Housing Program 4-80DP

Industry, Trade and Commerce

- * Global Import Quota on Footwear 6-80DP

Justice

- * Sexual Offences Against the Person 4-80DP
 - Soliciting for the Purpose of Prostitution 5-80DP
 - National Justice Statistics and Information 8-80DP
- * Review of the Criminal Code and Criminal Law Provisions of Federal Statutes 9-80DP

Labour

- Native Sport & Recreation Program 5-80DP (Fitness and Amateur Sport)
- Increased Funding and Staff Resources for the Women's Bureau, Labour Canada 4-80DP
- Labour Adjustment Benefits Program 6-80DP

Public Works

- * Complexe Guy-Favreau Montreal; Government of Canada Building 7-80DP
- * System to Improve the Management of the Accommodation and Services Provided by the Department of Public Works 2-80DP
- * Vieux-Port Quebec - Redevelopment 6-80DP

Regional Economic Expansion

- * Canada/Newfoundland Forestry Development 1980-1985 3-80DP
- Pulp and Paper Modernization Program 2-80DP

Secretary of State

- Native Women's Program 2-80DP
- Women's Program 3-80DP
- Migrating Native Peoples Program Capital Funding Sub-Program 4-80DP
- A Bill to Effect Amendments to the Canada Student Loans Act 6-80DP (R)

Solicitor General

- * Amendments to the Royal Canadian Mounted Police Act (P.S.C. 1970 c.P-9) Respecting Public Complaints, Internal Discipline and Grievance Procedures 4-80DP

Supply and Services

- Task Force on Service to the Public 2-80DP

Transport

- Hamilton Airport Development 23-80DP

Treasury Board

- Annual Report to Cabinet on the Status of the Official Languages Policies and Programs in the Federal Public Service 6-80DP
- Official Languages in the Public Service: Second Language Training 7-80DP

Veterans Affairs

- * The Aging Veteran and DVA 1-80DP

Appendix 4 PCO Counsel's 1985 Instructions to Departments on
Processing Access Act Requests for Accessible
Discussion Papers



Government of Canada
Privy Council Office

Gouvernement du Canada
Bureau du Conseil privé

Ottawa Canada
K1A 0A3

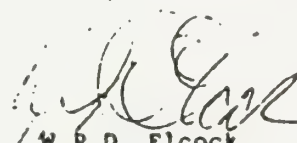
June 25, 1985

MEMORANDUM TO: M. Haunton (Communications)
A. McDonald (National Defence)
N. Jeffrey (Labour Canada)
M. Lefebvre (Transport Canada)
D. Myers (Indian and Northern Affairs)
E. Britt-Côté (Secretary of State)

Discussion Papers and Severance -
Access to Information Act

Recently it has come to our attention that Discussion Papers which appear to meet the criteria of paragraph 69(3)(b) of the Access to Information Act (i.e. the decisions have been made public or four years have passed since the decisions were made) contain information about the contents of confidences of the Queen's Privy Council for Canada such as Records of Decision or Memoranda to Cabinet.

It is our position that, once you have determined that the criteria of paragraph 69(3)(b) have been met and, subject to our approval, severability may be applied to these records in order to remove the references that have been made to confidences of the Queen's Privy Council for Canada. Once severability has been applied the record becomes subject to the Access to Information Act and it can be reviewed to determine what, if any, exemptions may apply.


W.P.D. Elcock
Counsel
Privy Council
Office

c.c.: H. Black (Justice)
P. Gillis (T.B.)
T. Nicholson (Pro)

Canada



Government of Canada
Privy Council Office

Gouvernement du Canada
Bureau du Conseil privé

Ottawa, Canada
K1A 0A3

Blackburn Building
85 Sparks Street
Room 601

BY HAND

May 27, 1985

MEMORANDUM TO: S. Perrin (Communications)
F. Sashaw (National Defence)
R.D. Needham (Labour Canada)
R. Côté (Transport Canada)
A. Faulkner (Indian and Northern Affairs)
M. Regan (Secretary of State)

Checklist for Discussion Papers

We have prepared a Checklist in consultation with the Justice Information Law and Privacy section and the legal advisors of each department concerned to assist you and your department in processing the review of Discussion Papers. For the moment I am enclosing a copy of the English version and as soon as the corrections to the French version have been made I will forward a copy to you.

I would like to draw to your attention that this Checklist, although possibly of some application to other cases which you may encounter in the future, has been designed to help you determine in this specific situation what Discussion Papers can be made available to the public. Therefore you will notice that in some cases we have indicated "put aside as not relevant to this exercise" in order to help separate out those Discussion Papers to which section 69 may still apply.

Yours sincerely,

Deborah MacNair
Office of the
Legal Counsel
(992-0720)

cc.: M. Haunton (Communications)
R.A. McDonald (National Defence)
N. Jeffrey (Labour Canada)
M. Lefebvre (Transport Canada)
D. Myers (Indian and Northern Affairs)
E. Britt-Côté (Secretary of State)
P. Gillis (Treasury Board)
L. Farrington (PCO)
T. Nicholson (PCO)
W.P.D. Elcock (PCO)
H. Black (Justice)
J.G. Leslie

Enclosure: 1

CHECKLIST FOR THE REVIEW OF DISCUSSION PAPERS
(paragraph 69(1)(b) of the Access to Information Act)

Introduction

The purpose of this checklist is to review with you the steps that should be followed to assist your government institution in determining if a record is a Discussion Paper within the meaning of paragraph 69(1)(b) of the Access to Information Act (the Act) and, if it is, how it should be treated under the statute in response to a formal request for access.

As required by statute, in order to qualify as a Discussion Paper, the record must have been prepared for the purpose of presenting background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions. (Reference should be made here to Treasury Board Circular No. 1983-45 which contains the guidelines on confidences of the Queen's Privy Council for Canada in relation to the Access to Information Act).

The Discussion Paper, as we know it today, was first introduced in 1977 and since that time it has been prepared following a generally accepted format (refer to Appendix D of the manual, The Cabinet Paper System, a copy of which your Cabinet Liaison Officer should have). As is pointed out in the Treasury Board Guidelines, however, each record must be reviewed in its entirety despite the title of the record because on occasion it may, for example, contain recommendations to Council to bring it within the meaning paragraph 69(1)(a). Other records, which do not follow the established format, may also qualify as "discussion papers" if they meet the criteria set out in the statute. Although the definition in the statute is broad enough to include many different forms of "discussions papers", for our purposes the term "Discussion Paper" will be used to denote the record which was first introduced in 1977 and which is described in the manual "The Cabinet Paper System".

One further point should be noted in regard to Discussion Papers. In certain circumstances, there is an exception to their exclusion from the application of the Act for twenty years. According to paragraph 69(3)(b), and as further described in the Treasury Board Guidelines, Discussion Papers become subject to the Act (1) once a decision to which a discussion paper relates has been made public or (2) where the decision to which the discussion paper relates has not been made public, if four years have passed since the decision was made.

THIS CHECKLIST IS FOR REFERENCE PURPOSES ONLY. YOU MAY ENCOUNTER SITUATIONS WHICH ARE NOT COVERED HERE. ANY QUESTIONS CONCERNING THE INTERPRETATION OF THE STATUTE AND WHETHER A RECORD MEETS THE CRITERIA SET OUT IN SECTION 69 SHOULD BE DIRECTED TO YOUR LEGAL ADVISOR, WHO WILL CONSULT WITH COUNSEL, PRIVY COUNCIL OFFICE. NO RECORDS SHOULD BE RELEASED TO AN APPLICANT (including a part of the record such as the title page) BEFORE THE ENTIRE RECORD HAS BEEN REVIEWED AND CONSULTATION HAS OCCURRED AS DESCRIBED IN STEPS 8 AND 9 BELOW.

STEPS TO FOLLOW:

1. LOCATE THE RECORD

- a CONTACT your Records Office or the Cabinet Liaison Officer to determine what records are held by your department.
- b ESTABLISH the date of the record (CHECK TO SEE IF IT FOLLOWS THE 1977 FORMAT).

2. ESTABLISH IF YOUR DEPARTMENT HAS PREVIOUSLY RELEASED (SINCE 1977) ANY DISCUSSION PAPERS TO THE PUBLIC

- a CHECK with the departmental Information Services to see if any Discussion Papers have been released previously to the public.
- b CONFIRM with your legal advisor that the record is a Discussion Paper within the meaning of paragraph 69(1)(b) (SEE step 3 below).
- c CONFIRM with your legal advisor the circumstances under which the Discussion Paper was released to the public and obtain copies of any documents which are evidence of the release.

e.g.- was it distributed by the Minister at a press Conference?

e.g.- have copies been placed in libraries both inside and outside of government?

e.g.- does your Access office have a record of this document previously being released to the public?

- d DETERMINE that the version you have is the same as the copy that was released to the public

IF Discussion Papers have been released previously and you have checked with your legal advisor copies can be made available to an applicant. GO TO STEP 8

3. DETERMINE IF RECORD IS A DISCUSSION PAPER WITHIN THE MEANING OF PARAGRAPH 69(1)(b)

- a ENSURE the record is less than 20 years old

- b CONFIRM you have the final version of the record.
- c READ the entire record to determine its overall purpose; do not rely on the title of the record alone.
- d ESTABLISH that the purpose of the record was to present background explanations, analyses of problems or policy options to Council for consideration by Council in making decisions, (see paragraph 69(1)(b)).
- e IF the record
 - (i) does not follow the usual format,
 - (ii) contains recommendations instead of policy options,
 - (iii) contains numerous references to other confidences of the Queen's Privy Council for Canada (e.g. Records of Decision, or Memoranda to Cabinet),
 - (iv) is in draft form or has been marked "withdrawn",

CONSULT your LEGAL ADVISOR who will raise the matter with Counsel, Privy Council Office.

GO TO STEP 4

4. REVIEW

- a If record IS a DISCUSSION PAPER, determine if subparagraphs 69(3)(b)(i) or 69(3)(b)(ii) apply (STEP 5).
- b If record IS NOT a DISCUSSION PAPER, put aside as not relevant to this exercise. CONFIRM with Legal Advisor that not subject to paragraph 69(1)(b) or paragraph 69(3)(b). (Note that the record may still be excluded as a confidence of the Queen's Privy Council under section 69).

5. DETERMINE if a DECISION has been MADE

- a CHECK to see if a decision has been made by Cabinet in relation to the Discussion Paper (To do this CHECK the related RECORD OF DECISION).

- b CONFIRM that the decision relates to the Discussion Paper (you may have to consult several Records of Decision). DO NOT REVEAL TO AN APPLICANT THE CONTENTS OF A RECORD OF DECISION. IF YOU ARE HAVING DIFFICULTY relating the Record of Decision to the Discussion Paper CONTACT YOUR LEGAL ADVISOR who will consult with Counsel, Privy Council Office.

IF DECISION has been MADE, DETERMINE if subparagraph 69(3)(b)(i) or 69(3)(b)(ii) apply (STEP 6).

IF NO DECISION has been MADE, put aside as not relevant to this exercise. CONFIRM with Legal Advisor that not subject to 69(3)(b). (Note that the record may still be excluded as a confidence of the Queen's Privy Council under paragraph 69(1)(b)).

6. DETERMINE WHETHER 69(3)(b)(i) OR 69(3)(b)(ii) APPLIES.

a. 69(3)(b)(i): DECISION has been made PUBLIC.

- i CHECK to see if the decision has been made public; for example

- did the Minister make an announcement in the House of Commons? (CHECK HANSARD).
- is there a news release in your departmental files (or press office) which is evidence of the decision having been made public?

- ii OBTAIN a copy of the news release or any other material which is evidence of the decision having been made public.

- iii CONFIRM with your legal advisor that the record meets the criteria of subparagraph 69(3)(b)(i).

b. 69(3)(b)(ii): DECISION made more than FOUR YEARS ago.

- i CHECK to see if four years have passed since DECISION was made (not four years since the date of discussion paper).

- ii CONFIRM with your legal advisor that the record meets the criteria of subparagraph 69(3)(b)(ii).

IF subparagraphs 69(3)(b)(i) OR 69(3)(b)(ii) APPLY, apply exemptions (STEP 7).

IF 69(3)(b)(i) AND 69(3)(b)(ii) DO NOT APPLY, put aside as not relevant to this exercise. CONFIRM with Legal Advisor that not subject to 69(3)(b). (Note that the record may still be excluded as a confidence of the Queen's Privy Council under section 69).

7. APPLY EXEMPTIONS

IF PARAGRAPH 69(3)(b) APPLIES, the Discussion Paper is no longer subject to section 69. CHECK to see if any EXEMPTIONS APPLY as the Discussion Paper is subject to the Act.

- a CHECK title page as well as the text of the record to see if any exemptions apply.
- b ARRANGE for your government institution to consult with other government institutions. concerning the application of the exemptions.

GO TO STEP 8

8. ARRANGE FOR DECLASSIFICATION

- a CONSULT with departmental security officer IF DECISION is made to RELEASE the record to a applicant, whether exemptions are claimed or not, to arrange for de-classification of the record.
- b CHECK to see that any records previously released have been properly de-classified (SEE STEP 2) .

GO TO STEP 9

9. CONSULT WITH LEGAL ADVISOR

- a CONFIRM with LEGAL ADVISOR that records selected as Discussion Papers to be released are subject to paragraph 69(3)(b).
- b PRIOR TO THE RELEASE OF ANY RECORDS (INCLUDING THE TITLE PAGE) THE LEGAL ADVISOR SHALL CONTACT COUNSEL at the Privy Council Office to advise of the release. Arrange for Counsel at the Privy Council Office to review any Discussion Papers for which an exclusion is claimed under paragraph 69(1)(b).

Ken Rubin
68 Second Avenue
Ottawa K1S 2H5

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September 1986

Appendix 5: A LIST OF DISCUSSION PAPERS PREPARED BY KEN RUBIN

The below list of discussion papers is the most comprehensive public list of discussion papers compiled to date and is based on an actual examination of each of the documents. It is, however, not a total list of all departmental discussion papers available under Section 69(3)(b) of the Access to Information Act as I have only obtained these documents, or some of them, from nineteen federal departments. Appendix 3 lists a few other discussion papers that I did not review but which are claimed to be available. My list probably represents a sizeable group of disclosable discussion papers and covers many of the larger federal departments where most of the discussion papers in the 1977 to mid-1984 period were prepared for cabinet submission.

I have divided this list of discussion papers into three parts. Part A consists of 186 discussion papers that I obtained from twelve federal agencies formally under the Act who all claimed these represented their complete list of currently disclosable discussion papers. Part B consists of the 40 discussion papers I have obtained to date from three agencies after Access Act applications. Part C lists 9 discussion papers that I obtained informally in the spirit of the Act from four agencies.

Note that under Section 69(3)(b)(ii) of the Act some agencies may or will have prepared a few more discussion papers in the 1982 to 1984 period that become disclosable only later this year or in 1987 or 1988.

The following data on each of the 235 discussion papers, where available, has been extracted:

- . title and date of discussion paper per department
- . co-sponsors if applicable
- . the number of pages (English only)
- . the exemptions or exclusions cited under the Act
- . if known to have been previously released a) publicly by Ministers and b) under the Access Act.

Should the reader wish to view the actual documents contact the departments to allow you to do this free of charge. Should you wish copies, negotiate any copying costs with the departments, bearing in mind most agencies will generally allow the first 125 pages of photocopying for free.

PART A: Agencies Claiming To Have Disclosed All Their Accessible
Discussion Papers Under the Access Act

Communications Canada

- . Cultural Programs for National Unity. 7-77DP May, 1977
(formerly Secretary of State) 18 pages
- . Canadian Participation in the European Space Agency
2-77DP, December 5, 1977, 33 pages
 - 69(1)(g)
- . Canadian Feature Film Industry. 12-77DP, September 28, 1977
(formerly Secretary of State) 7 pages
- . Governor-in-Council Review of Telecom Decision CRTC-77-10
(Telesat). 4-77DP, October 4, 1977, 20 pages
- . Anik B Communications Program 5-77DP, December 5, 1977, 20 pages
 - 69(1)(g)
- . Challenge for Change 1-78DP, December 15, 1977,
(formerly Secretary of State) 26 pages
- . A Program for the Development of Communications Electronics
Industry in Canada, no recorded DP number, October 14, 1978
36 pages (Cabinet decision taken November 12, 1978)
- . Development of the Canadian Book Publishing Industry 5-78DP,
December 4, 1978, 83 pages
 - Sections 20(1)(b), 69(1)(g)
- . Submission on CRTC Decision 78-724 (Appeal of BC Cable decision)
1-79DP, January 16, 1978, 117 pages
- . Canadian Participation in the 1979 World Administrative Radio
Conference 2-79DP, January 22, 1979, (with External Affairs)
11 pages
 - Sections 15(1)(e)&(g), 69(1)(g)
- . Canadian Participation in the International Maritime Satellite
Organization (INMARSAT) 3-79DP, February 17, 1979 (concurred
with External Affairs and Teleglobe), 32 pages
 - 69(1)(g)
- . The Canadian Space Program - Five Year Plan (80/81 to 84/85)
6-79DP, December 5, 1979, 31 pages - previously published
in January, 1980, catalogue no. 22-23/1980
- . Office Communications Systems Program 5-80DP, September 19, 1980,
(with ITC) 11 pages
 - 69(1)(c) & (g)
- . Augmentation of the Telidon Program 1981/82, 1982/83, 1-81DP,
January 20, 1981, 33 pages

Communications (continued)

- . National Museums of Canada Accommodations Issues, 2-81DP, March 31, 1981, 25 pages
 - 69(1)(g)
- . Office Communications Systems Program, 1-82DP, March 26, 1982 (with Industry Trade & Commerce), 36 pages
- . A National Broadcasting Strategy, 3-82DP, May 26, 1983, 89 pages
- . Northern Broadcasting, 1-83DP, February 18, 1983, 111 pages
 - previously released under Access Act
 - 13(1)(c), 20(1)(d), 21(1)(a), 69(1)(b)
- . Towards a National Broadcasting Strategy (CBC), 3-83DP, May 26, 1983, 89 pages

Energy Mines and Resources

- . Executive Summary: Northern Pipelines, 5-77DP, April 26, 1977, 50 pages.
 - 13(1)(c), 14, 20(1)(b)(c)
- . Provision of International Prices for Synthetic Crude Oil Production, 6-77DP, June 9, 1977, 17 pages
 - 20(1)(b)(c), 21(1)(b), Appendix C 20(1)(b)(c)
- . Development of Federal Policies Towards Heavy Oil and Enhanced Recovery Development, 23-77DP, November 22, 1977, 16 pages
 - 13(1)(c), 14, 20(1)(b)(c), 69(1)(d)
- . Energy Projects in Relation to Medium-Term Economic Development 1-78DP, January 27, 1978, 12 pages
- . Privatization of Petro-Canada, 8-79DP, August 21, 1979, 47 pages
 - 20(1)(b), 69(1)(d)(g)
- . Privatization of Eldorado Nuclear Limited and Its Wholly Owned Subsidiaries, Eldorado Aviation Limited and Eldor Resources Limited, 15-79DP, August 9, 1979, 83 pages
 - 14, 18, 20(1)(b)(c)(d), 21(1)(a), 69(1)(d)
- . West-East Oil Pipelines, 16-79DP, August 30, 1979 (with Environment) 54 pages
 - Annex 3 p.3 15(1)
- . International Energy Agency Ministerial Meeting, 19-79DP, December 10, 1979, 13 pages
- . Mineral Policy, 1-81DP, December, 1981, 161 pages, published by DSS

External Affairs

- . Canadian Participation in the UN Water Conference, 2-77DP, January 31, 1977 (with Fisheries and Environment), 20 pages
- . Approval of the Air Transport Agreement Between the Government of Canada and the Government of Finland, 3-77DP, March 15, 1977 (with Transport), 35 pages
 - 15(1)
- . Canada's Interests in CIEC (Conference on International Economic Cooperation), 4-77DP, April 21, 1977, 8 pages
 - 15(1)
- . Conference on International Economic Cooperation: Possible Outcomes of and Areas Where Canadian Decisions May Be Required, 5-77DP, May 5, 1977 (with PCO), 11 pages
 - 15(1)
- . Assistance to Portugal, 7-77DP, June 15, 1977, 13 pages
 - 13(1)(a), 15(1), 69(1)(g)
- . Southern Africa, 10-77DP, November 7, 1977, 39 pages
 - 13(1)(a), 15, 20(1)(b), 69(1)(g)
- . Third United Nations Conference on the Law of the Sea, 11-77DP, November 15, 1977, 17 pages
 - 21(1)(c)
- . Approval of the Air Transport Agreement Between The Government of Canada and The Government of Haiti, 1-78DP, January 12, 1978, (with Transport), 41 pages
- . Approval of The Air Agreement Between The Government of Canada and The Government of The Argentine Republic, 3-78DP, February 27, 1978 (with Transport), 45 pages
 - 15(1), 20(1)(b)
- . Canada's Relations With Developing Countries, 5-78DP, March 20, 1978, 18 pages
 - 15(1)
- . Canada/Caribbean Common Market (CARICOM) - Trade and Economic Cooperation Agreement, 7-78DP, June 8, 1978 (with Finance, ITC) 12 pages
- . Canadian Policy Towards Cuba, 8-78DP, June 9, 1978, 12 pages
 - 15(1)
- . Federal Government Participation in a Special World Exhibition - Les Floralties internationales de Montréal, 1980, 2-79DP, July 5, 1979 (with ITC, Agriculture), 10 pages (previously released under Access Act)

External (continued)

- . Canada/USA East Coast Fishery Resources Agreement, 5-79DP, July 18, 1979, number of pages unknown, (with Fisheries and Oceans)
 - totally exempt 13(1)(a), 15(1), 21(1)(c)
- . Canada in a Changing World, 7-79DP, November 30, 1979
 - Part I: The Global Framework 50 pages
 - Part II: Canadian Aid Policy (with CIDA) 58 pages(part of House of Commons Standing Committee on External Affairs and National Defence Proceedings June 10, 1980 - available in External's Library)
- . UN Conference on Restrictive Business Practices, 10-79DP, October 19, 1979 (with Consumer and Corporate Affairs), 74 pages
 - 15(1)
- . Canadian Aid Policy, 11-79DP, November 19, 1979 (with CIDA) 62 pages
- . Canada and the Commonwealth Caribbean, 5-80DP, April 28, 1980, 47 pages
 - 13(1)(a), 15(1)
- . Legal and Political Options on the East Coast Fisheries and Boundary Problem, 9-80DP, June 11, 1980, number of pages unknown
 - totally exempt 15(1), 21(1)(c), 69(1)(g)
- . Moscow Olympics, 10-80DP, March 11, 1980, 6 pages
 - 13(1)(a)(b), 15(1), 19(1)
- . Third United Nations Conference on The Law of the Sea Resumed Ninth Session, 12-80DP, July 18, 1980, 27 pages
 - 13(1)(a), 15(1), 21(1)(c), 69(1)(g)
- . Canada/USA Pacific Salmon Negotiations, 1-81DP, number of pages unknown
 - totally exempt 15(1), 21(1)(c) (with Fisheries and Oceans)
- . Possible Canadian Participation in the Proposed Multi-National Force for the Sinai Peninsula, 2-81DP, June 8, 1981, 19 pages
 - 13(1)(a), 15, 20(1)(b)(c)&(d)
- . Canada-USA GATT Article XXII Consultations on the Foreign Investment Review Act - FIRA, 1-82DP, March 15, 1982 (with International Trade, ITC), 39 pages
- . Report on the Royal Commission on Conditions of Foreign Service - Possible Responses, 1-83DP, May, 1983, 155 pages
 - tabled in House of Commons May 31, 1983 - in External Library
- . Canadian Trade Policy for the 1980's, 3-83DP, August, 1983, 56 pages - in External Library, released in booklet form
- . Treaty Between Canada and the United States of America Relating to the Skagit River and Ross Lake, and the Seven Mile Reservoir on the Pend D'Oreille River, 01-84DP, March 5, 1984, 30 pages
 - 13(1)(a), 14(a)

Indian and Northern Affairs

A. Indian Affairs

- . Residual Land Entitlements: Prairie Provinces, 1-77DP, February 23, 1977, 17 pages
 - 21(1)(c)
- . Proposed Infrastructure Program for Indians and Reserves, 3-77DP, June 23, 1977, 19 pages
 - 69(1)(g)
- . Proposed Housing Policy for Indians on Reserves, 4-77DP, June 23, 1977, 29 pages
- . Cut Off Reserve Lands, BC., 7-77DP, 9 pages 21(1)(c)
 - plus 6-79DP, October 29, 1979, 17 pages
 - 21(1)(c)
 - plus 3-81DP, May 11, 1981, 21 pages 21(1)(c)
- . Revenues to Indian Bands from the Oil Export Tax, 1-78DP, 7 pages
 - 14(a), 69(1)(d)&(g)
- . Federal Government-Native Council of Canada Consultative Process (originally Privy Council paper), 2-78DP, 18 pages
 - 23, 69(1)(c)&(g)
- . Proposals for Legislation Respecting Local Government and Lands for the Crees and Naskapis of the James Bay Territory, 1-80DP, March 24, 1980, 36 pages
- . * Fort Nelson Indian Reserve Minerals Revenue Sharing Act, 2-80DP, April 11, 1980, 4 pages
- . Indian on Reserve Housing Program, 4-80DP, July 4, 1980, 21 pages
 - plus 2-82DP, January 20, 1982 - not provided with number of pages
- . Repeal of the Land Titles Act, 5-80DP, June 20, 1980, 4 pages
- . Native Claims Policy - Comprehensive Claims, 6-80DP, November 5, 1980, 29 pages 21(1)(c)
- . * Indian Involvement in Resource Development, 7-81DP, June 19, 1981, 83 pages
- . Native Claims Policy: Further Treatment of Specific Claims, 9-81DP, December 4, 1981, 23 pages
 - 21(1)(c)
- . Amendments to Remove the Discriminatory Section of the Indian Act, 8-81DP, October 2, 1981, 24 pages
- . * An Optional System of Indian Band Government, 1-82DP, June 14, 1982, 26 pages
 - * plus 7-82DP, July 16, 1982, 18 pages

* asteriks refer to IAN discussion papers released by John Munro on June 22, 1984 before his departure as Minister.

Indian Affairs (continued)

- . James Bay and Northern Quebec Agreement: Review of Federal Implementation, 3-82DP, May 13, 1982, 107 pages
- . * Indian Treaty Land Entitlement: Transfer of Prince Albert Indian Student Residence to Peter Ballantyne Band, 6-82DP, June 18, 1982, 22 pages
 - 69(1)(c)(d)(f)(g), 13(1)(c)
- . * Assistance to Indians and Inuit to Develop Capabilities for Response to Major Development Projects, 3-83DP, September 27, 1983, 24 pages
 - 69(1)(g)
- . * First Nations Elementary and Secondary Education, 1-84DP, January 13, 1984, 191 pages
 - 69(1)(g)
- . * Thunder Child Technical Institute Residence Accommodation, 2-84DP, March 14, 1984, 10 pages

B. Northern Affairs

- . Review of Beaufort Sea Drilling 1976 Conditions for 1977 Drilling Operations, 2-77DP, May 6, 1977, 31 pages
 - plus 1977 Review 5-78DP, 41 pages
 - plus 1981 Review, 5-82DP, May 27, 1982, 36 pages
- . Amendments to the Canada Elections Act and the NWT Act, 8-77DP, 6 pages
- . Financial Viability of the Northern Canada Power Commission and Northern Power Rates, 4-78DP, April, 1978, 25 pages
 - 21(1)(a), 69(1)(g)
- . The Polaris Project of Arvik Mines Ltd1, 1-79DP, February 7, 1979, 49 pages
- . Proposed Amendments to the Yukon Quartz Mining Act, 3-80DP, April 21, 1980, 3 pages
- . New Policy for Wildfire Management in the North, 1-81DP, 32 pages
- . * Inuit Television and Broadcasting, 2-81DP, April 16, 1981 (with Secretary of State), 99 pages 69(1)(c)
- . Norman Wells Oil Field Expansion and Pipeline Project, 5-81DP, June 26, 1981, 19 pages
- . Northern Land Use Planning, 6-81DP, July 9, 1981, 40 pages
- . Northern Hydrocarbon Developments: A Government Planning Strategy 4-82DP, May 13, 1982, 18 pages
- . * plus update 2-83DP, May 18, 1983, 39 pages with exemptions 15(1)(c), 69(1)(g)
- . Northern Inlands Waters Act, 8-82DP, November 26, 1982, 9 pages
- . Implementation of the Northern Flood Agreement (Manitoba), 3-84DP, May 7, 1984, 51 pages
 - 13(1), 14(b), 21(1)(c), 23

Investment Canada (formerly Foreign Investment Review Agency)

- . Review of Operations Under the Foreign Investment Review Act, 1-77DP, January 27, 1977 (with ITC & S.B.), 24 pages
 - 69(1)(c), 24(re Section 36 I.C. Act)
- . Interim Procedures For Small FIRA Cases, 2-77DP, January 27, 1977, (with ITC & S.B.), 7 pages
 - 69(1)(a)&(c)
- . Review of Operations Under the Foreign Investment Review Act, 4-77DP, June 16, 1977 (with ITC), 35 pages
 - 69(1)(c)
- . Foreign Investment in Canada and the Canadian Investment Climate, 5-77DP, June 16, 1977 (with ITC & Finance), 26 pages
- . The Foreign Investment Review Act As Applied to Major New Resource Projects, 1-78DP, January 19, 1978 (with ITC), 9 pages
 - Section 24 (Section 36, I.C.Act)
- . The Foreign Investment Review Act: Alternative Canadian Buyer, 2-78DP, January 27, 1978 (with ITC), 9 pages
 - 69(1)(a)&(c)
- . Foreign Investment Review Act: Benchmarks For Assessing Significant Benefit, 3-78DP, January 27, 1978 (with ITC), 9 pages
 - 69(1)(a)&(c)
- . Foreign Investment Review Act: The Use of Canadian Professional Services By Foreign Investors, 4-78DP, January 27, 1978 (with ITC), 10 pages
 - 69(1)(a)&(c)
- . Foreign Investment Review Act: Procedures and Documentation, 12-78DP, December 19, 1978 (with ITC), number of pages unknown
 - The entire document except the title page is exempted under Section 23
- . The Foreign Investment Review Act: Overview of Operations, 4-79DP, June 22, 1979 (with ITC), 29 pages
 - 69(1)(a)(c)&(f), Section 24 (Section 36, I.C.Act)

Justice

- . The Judges Act: Proposed Amendments, 01-77DP, February 11, 1977, 19 pages

Justice (continued)

- . Sovereign Immunity in Canadian Courts, 06-77DP, December 15, 1977 (with External Affairs), 5 pages
(was never the subject of cabinet decision)
- . An Act to Amend the Food and Drugs Act, the Narcotics Control Act, the Customs Act and the Excise Act, 01-78DP, no date, 12 pages
- . Fugitives Offenders Act, 04-79DP, August 8, 1979, 7 pages
(unsure if cabinet discussion paper - no PCO record of it)
- . Proposals for Amending Part IV of the Canadian Human Rights Act, 05-79DP, August 15, 1979, 13 pages
- . Proposals for Amending Section 41 of the Federal Court, 06-79DP, September 14, 1979, 11 pages
(was published - no date given)
- . The Judges Act: Judicial Compensation and Related Matters, 07-79DP, September 22, 1979, 67 pages
- . Proposals for Amending Part IV of the Canadian Human Rights Act, 02-80DP, June 17, 1980, 18 pages
- . Soliciting For The Purpose of Prostitution, 05-80DP, July 11, 1980, 10 pages
 - Section 23
- . State Immunity, 06-80DP, June 17, 1980, 17 pages
- . National Justice Statistics and Information, 08-80DP, January 15, 1981, (with Solicitor-General), 31 pages
- . Cannabis Review, 02-81DP (with Health and Welfare and Solicitor General), 107 pages
 - Section 16(1)(a)(b) and (c) and 23
 - Justice notes that 07-80DP on Cannabis Review was destroyed and superceded by 02-81DP.
- . Cannabis Review, 02-81DP(R) March 30, 1981 (with Solicitor General), 97 pages
(previously released under Access Act)
- . Alleged War Criminals in Canada, 03-81DP, July 12, 1981, 20 pages
 - Section 19(1) - (previously released under Access Act)
- . Demonstrations Directed at Foreign Diplomatic and Consular Establishments, 04-81DP, April 29, 1981 (with External), 8 pages
 - 16(2)(c), 69(1)(g)
- . New Canada Evidence Act, 03-82DP, June 2, 1982, 22 pages
- . Divorce Law Reform, 05-82DP, January 31, 1983, 86 pages
 - 13(1)(c), 14(1)(a), 21(1)(a)&(c)

Justice (continued)

- . Criminal Law and Procedure - The Jury, 03-83DP, June 30, 1983, 37 pages
- . Criminal Law Review Theft and Fraud, 04-83DP, June 30, 1983, 24 pages
 - 13, 14, 19, 21(1)(a)(b), 69
- . Proposals to Amend The Federal Court Act, 05-83DP, August 29, 1983, 19 pages
 - 14, 21(1)(a), 23 (previously released in abridged form to Canadian Bar Association)
- . Criminal Law Review - Contempt of Court, 06-83DP, September 22, 1983, 36 pages
 - 14(a)
- . Impaired Driving, 07-83DP, October 11, 1983, 58 pages
 - 14(1)(a), 21(1)(a)

Labour Canada

- . Report of the Inquiry into Canadian Railway Pension Plans, 1-77DP, 18 pages
- . Canada Labour Code - Part III - Division II Revision of Federal Minimum Wage, 2-77DP, 11 pages
 - plus report 78-DP, 17 pages
- . Labour-NHW Proposal to Create a Canadian Centre for Occupational Health and Safety, 4-77DP (with Health and Welfare), 25 pages
 - plus Increased Funding for CCOHS, 3-81DP, 12 pages
 - plus Five Year Development Plan - CCOHS, 1-83DP, 95 pages
- . Representation of Employee Interests on Board of Directors of Crown Corporations, 5-77DP, 12 pages
- . Ministers of Labour Meeting January 23-24, 1978, 1-78DP, 5 pages
- . Proposal for the Extension and Modification of Labour Canada's Adjustment Assistance Benefit Programs, 4-78DP, 11 pages
 - plus report 1-79DP, 16 pages
 - plus report 6-80DP, 40 pages
- . Resolution of Essential Services Disputes in the Federal Sector, 2-79DP, 30 pages
- . Amendments of Department of Labour Act to Delete Requirement to Publish the Labour Gazette, 1-80DP, March 17, 1980, 3 pages
- . The Establishment of a Labour Information Bureau, 2-80DP, 18 pages
- . Problems Arising From the Recent Labour Canada Involvement in The Uranium Mining Field, 3-80DP, 9 pages

Labour (continued)

- . Increased Funding and Staff Resources for the Women's Bureau, Labour Canada, 4-80DP, 11 pages
- . Native Sport and Recreation Program, 5-80DP, November 5, 1980 (with Amateur Sports & Fitness), 11 pages

National Defence

- . Katimavik, 9-77DP, November 18, 1977, 36 pages
 - 69 previously released under Access Act
- . Katimavik, 8-78DP, October 25, 1978, 40 pages
 - 69 previously released under Access Act
- . Selection of A New Fighter Aircraft, 1-80DP, February 28, 1979, 30 pages
 - 13, 15, 20(1)(b)(c)(d), 21, 69 (previously released under Access Act)

National Health and Welfare

- . The Importance of Nutrition in the Government's Food Strategy, 1-78DP, January 20, 1978, 27 pages
 - 19(1)
- . International Year of the Child, no number, March 29, 1978, 13 pages
- . Health Entry Plan, British Columbia, 5-78DP, April 14, 1978, 15 pages
 - 69(1)(c)
- . Proposed Changes to the Spouse's Allowance Program, 6-78DP, April 17, 1980, 12 pages
- . Integration of Nutrition Into the Food Strategy, no number, December 12, 1978, 15 pages (published)
- . Towards a National Policy - Fitness and Physical Recreation, 1-79DP, January 31, 1979, 87 pages published as a Green Paper
- . Extension of Spouse's Allowance for Widowed Recipients and Removal of Old Age Security Improvement Rule, 7-79DP, August 20, 1979, 15 pages
- . Amendments to the Radiation Emitting Devices Act, no number, March 28, 1980, 3 pages
- . Decentralization of Income Security Programs, Ontario Regional Office, and Relocation of Its Nova Scotia Office to Sydney, 2-80DP, May 14, 1980, 33 pages
 - 69(1)(a)(c)(d)(g)

National Health and Welfare (continued)

- . Transfer of Health Services to Indian Communities, 5-81DP, May 15, 1981, 40 pages
- . Elimination of the Child Income Test Under the Family Allowances Program, 8-81DP, October 14, 1981, 16 pages
 - 69(1)(c)(g)
- . Improvements in Canada Pension Plan Disability Benefits, 9-81DP, November 1, 1981, 46 pages
 - 69(1)(g)
- . Old Age Security/Guaranteed Income Supplement Program, 3-83DP, August 23, 1983, 60 pages

Revenue Canada (Customs & Excise)

- . Act Respecting Customs, 1-77DP, November 21, 1977, 22 pages
 - plus 1-79DP, August 31, 1979, 26 pages
 - plus 1-80DP, March 26, 1980, 26 pages
- . Establishment of Duty Free Shops at the Land Frontier, 2-80DP, May 6, 1980, 17 pages

Secretary of State

- . Open House Canada Program, 1-77DP, February 2, 1977, 8 pages
- . Migrating Native Peoples, 6-77DP, May 31, 1977, 41 pages
 - plus same title, 4-80DP, June 12, 1980, 5 pages
- . Renegotiation of the Federal-Provincial Agreement for Bilingualism in Education, 11-77DP, September 22, 1977, 41 pages
 - 69(1)(g)
 - plus 3-78DP, September 9, 1978, 78 pages
- . Legislation on Public Access to Government Documents, 2-78DP, 24 pages
 - plus Access to Information Legislation, 5-80DP, June 10, 1980, (with Communications), 30 pages
- . Festival Canada, 4-78DP, November 11, 1978, 21 pages
- . Native Women's Program, 10-79DP, 75 pages
 - plus 2-80DP, June 12, 1980, 6 pages
- . Applications to Host the 1988 Winter Olympic Games, 11-79DP, September, 1979 (with Health and Welfare), 15 pages
- . Bill to Effect Amendments to the Canada Student Loans Act, 13-79DP, November 26, 1979, 6 pages
 - plus 6-80DP, July 15, 1980, 6 pages

Secretary of State (continued)

- . Multiculturalism, 1-80DP, June 12, 1980, 10 pages
- . Women's Program, 3-80DP, June 12, 1980, 8 pages
- . Native Communications Programme, 1-81DP, February 16, 1981, 14 pages

Treasury Board

- . Expenditure Budget Projections 1978-79 to 1980-81, March 11, 1977, 44 pages
 - 69(1)(g)
- . Expenditure Budget Projections 1979-80 to 1981-82, April 20, 1978, 56 pages
 - 69(1)(g)
- . Increased Indian, Metis and Non-Status Indian and Inuit Participation in the Public Service of Canada, May 24, 1977 and June 21, 1977, 15 pages
- . Service to the Public, January 24, 1978, 29 pages (with Chairman, Cabinet Information Sub-Committee)
 - 69(1)(a) twice
- . Report on Tomenson-Alexander Associates Ltd. Study on Certain Public Service Employee Pension Questions, January 27, 1978, 37 pages
- . Official Languages in the Public Service: Second Language Training, June 26, 1980, 41 pages
- . Annual Report to Cabinet on the Status of the Official Languages Policies and Programs in the Federal Public Service, June 26, 1980, 37 pages

PART B: Agencies Who Have Disclosed Only Part of Their Accessible Discussion Papers As a Result of Access Applications

Agriculture Canada

NOTE: Agriculture Canada provided the below fifteen discussion papers in November, 1985.

- . Challenge for Growth: an Agri-Food Strategy for Canada, 6-81DP, July 9, 1981, 95 pages
- . Proposal for the Establishment of a Chicken Marketing Agency, 5-77DP, May 17, 1981, 13 pages
- . Fruit and Vegetable Storage Construction Financial Assistance Program, 9-80DP, May 16, 1980, 7 pages
- . Drought Situation in Western Canada (Co-authored by DREE), 12-80DP, May 29, 1980, 6 pages
- . Amendments to the Pest Control Products Act, 8-80DP, June 12, 1980, 3 pages

Agriculture (continued)

- . Seed Potato Sector, 10-80DP, July 11, 1980, 11 pages
- . A Bill to Amend the CAPS Act, 17-80DP, July 11, 1980, 3 pages
- . Financing Alternatives for CANFARM Cooperative Services, 21-80DP, December 15, 1980, 8 pages
- . CANAGREX, 19-80DP, February 3, 1981, 91 pages
- . Approval for Consolidation of Market Support Programs of Agriculture Canada and Approval of Canadian Agricultural Market Development Fund, 5-81DP, February 26, 1981, 7 pages
- . Parimutuel Betting on Horse Races, 7-81DP, March 30, 1981, 8 pages
- . Revision of the Livestock Pedigree Act, 8-82DP, October 20, 1982, 5 pages
- . Revision of the Livestock Pedigree Act, (Part II), 6-83DP, November 15, 1983, 5 pages
- . Red Meat Stabilization Plan, 5-84DP, March 15, 1984, 16 pages
- . Proposed Amendments Western Grain Stabilization Act, April 1984, 28 pages.

NOTE: Ten further discussion papers were provided by Agriculture by August, 1986 leaving some twenty papers still in the review process.

- . The Distribution of Maritime Produced Potatoes - Recommended Policy for Registered Rail Car Potatoes, 8-77DP, June 6, 1977, 9 pages
 - 21(1)(a)
- . Plant Breeders' Rights Legislation for Canada, 9-77DP, June 8, 1977, 22 pages
 - 21(1)(a)
- . Revocation of the Inspection and Sale Act, 10-77DP, July 15, 1977, 17 pages
- . Disposition of Canfarm Service Agency, 14-78DP, November 8, 1978, 5 pages
- . Assessment of Methods to Increase the Flow of Private Capital into Long-Term Farm Credit, 1-79DP, December 30, 1978, 21 pages
 - 21(1)(a)
- . Extension of the Livestock Feed Assistance Act to the Yukon and Northwest Territories, 6-79DP, September 10, 1979, 3 pages
- . Revocation of Obsolete Legislation, 7-79DP, September 5, 1979, 3 pages

Agriculture (continued)

- . Amendments to the Farm Improvements Loans Act, 5-80DP, March 21, 1980, 9 pages
- . Proposal for Revocation of the Prairie Farm Assistance Act and Utilization of the Fund for Research, 11-80DP, June 17, 1980, 5 pages
 - 21(1)(a)
- . Revisions to the Farm Credit Act, 11-81DP, July 6, 1981, 22 pages

Regional Industrial Expansion

RIE in April, 1985 located three papers that were previously released, all prepared by the previous Regional Economic Expansion Department. The released documents bear no dates or discussion paper numbers. RIE claims to have an additional 165 papers, including those from the former departments of Industry, Trade and Commerce and Regional Economic Expansion. I am currently fighting for them in Federal Court.

- . Canada/Newfoundland Forestry Subsidiary Agreement 1981-86 (with Environment), 11 pages
- . Canada/Newfoundland Coastal Labrador Development, 19 pages
- . Pulp and Paper Modernization Program, (likely 2-80DP), 24 pages

Transport

The following papers were viewed only in late August, 1986 after the Executive Assistant to the Minister of Transport indicated they were available in their Library. All had been previously released and sent to the Library in the 1980 to 1985 period, some after my Access application had been received by Transport in April, 1985. Transport refuses to indicate how many additional papers it has and is denying me those papers until I pay search fees of \$950 as a minimum. The matter is currently in Court. *

* Note for the record that Finance who I am also in Court with, claims to have up to 45 disclosable discussion papers for which they want \$470 in search and preparation fees; photocopy costs are additional.

Transport (continued)

- . Newfoundland Transportation - Response to the Sullivan Commission Recommendations 16-80DP, July 18, 1980, 41 pages
and 17-80DP, May 22, 1980, 35 pages
- . Control of Pollution From Shipping in Waters Under Canadian Jurisdiction 18-80DP, March 31, 1980, (with External Affairs, Fisheries and Oceans, Science and Technology, Environment), 32 pages
- . Financial Assistance to the White Pass and Yukon Railway 20-80DP, May 23, 1980, (with Indian and Northern Development), 17 pages
- . Hamilton Airport Development 23-80DP, July 24, 1980, 20 pages
- . Railway Relocation Program in Regina 25-80DP, December 4, 1980, 20 pages
- . Amendments to the Canada Shipping Act - Part XX - Liability and Compensation 28-80DP, July 31, 1980, 24 pages
- . Amendments to the Canada Shipping Act - Part XX - Pollution Prevention and Clean-Up Amendments to Other Parts of the Act 29-80DP, July 31, 1980, 16 pages
- . Polar Icebreaker Program 31-80DP, October 27, 1980, 66 pages
- . Legislative Proposals Regarding Railway Freight Rates 33-80DP, December 1, 1980, 9 pages
- . National Ports Policy 7-81DP, March 27, 1981, 32 pages
- . Industry-Oriented R&D in the Rail Freight Sector - A Longer Term Plan 8-81DP, June 3, 1981, 37 pages

PART C: Agencies Providing Various Disclosable Discussion Papers Informally

Consumer and Corporate Affairs

These three papers were originally prepared as a result of a formal Access application by another requestor.

- . A Strategy for Food Processing, Distribution and Retailing Sectors 02-78DP, 57 pages
 - published by the department
- . Cellulose Insulation 3-79DP, September 19, 1979, 31 pages
 - 18(b)
- . Canadian Membership in the International Organization of Legal Metrology 01-81DP, February 5, 1981 (with External Affairs), 31 pages

Consumer and Corporate Affairs (continued)

As well, Consumer and Corporate Affairs provided the titles of three Section 69(3)(b) discussion papers not prepared as yet for disclosure. The titles of the three discussion papers that were not applied for or examined are:

- . Consumer Initiatives and a Food Strategy for Canada 01-78DP, January 25, 1978, 21 pages
- . Proposals for a Securities Market Law for Canada 3-78DP, 15 pages
- . Bilingual Labelling Exemptions 5-78DP, August 28, 1978, 16 pages

Environment Canada

To date only one discussion paper released (in 1986) informally to myself and formally to another applicant

- . Long Range Transport of Air Pollutants - Acidic Precipitation, 5-80DP, May 30, 1980, (with Health and Welfare, Fisheries and Oceans, and External Affairs), 33 pages
 - 69(1)(g)

Privy Council Office

The papers below were provided in 1985-86 to myself informally and formally to another applicant.

- . Legislation on Public Access to Government Documents 1-77DP, February 14, 1977, (with Secretary of State), 57 pages (published with some alterations as a Green Paper in June 1977)
- . Privatization of Crown Corporations 3-79DP, June 14, 1979, 39 pages
- . Freedom of Information Legislation 7-79DP, August 17, 1979, 42 pages
- . Release of Discussion Papers 9-79DP, October 4, 1979, 4 pages

Supply and Services Canada

Only one DSS paper was requested informally.

- . DRAFT no. 1 Service to the Public, July 1979, 12 pages
 - published later in alternative form as Discussion Paper, Task Force on Service to the Public, July, 1980, 45 pages

Appendix 6 An Example of a Section 69 Severance
Applied to an Access Act Request

The example used here is drawn from Case Seven in Chapter II of the report where the Atomic Energy Control Board made claims for cabinet confidentiality for their Board meeting minutes of October 12, 1977 where they were discussing the implications of the amendment to the Uranium Information Security Regulation.

Minutes of the 122nd (Special) Meeting of the Atomic Energy Control Board held in the Conference Room, AECB Offices, 270 Albert Street, Ottawa, on Wednesday, 12 October, 1977, beginning at 2000 hours

P R E S E N T :

Dr. A. T. Prince, Chairman
Professor L. Amyot
Mr. J. L. Olsen

Mr. J. H. Jennekens
Mr. J. F. D. MacIsaac
Mr. J. G. McManus
Mr. R. W. Blackburn, Secretary

Chairman and Secretary

1. The President took the chair and the Secretary of the Board acted as secretary of the meeting.

Constitution of Meeting

2. The Secretary noted that this special meeting was being held pursuant to the provisions of Section 4(4) of the Rules with a quorum of Members being present and the absent Members (Dr. Schneider and Miss Rudoruk) having agreed to the meeting being held in their absence.

Agenda

3. An agenda was not prepared since there was but a single item of business - the proposed amendment of the Uranium Information Security Regulation.

Amendment of Uranium Information Security Regulation

4. Dr. Prince opened the meeting by thanking the Members for their cooperation in attending the meeting at such short notice and late hour, and by indicating that this meeting was being held at the request of the Minister to consider the making of amended Uranium Information Security Regulations. A draft version of these proposed Regulations, prepared by the Department of Justice, was passed to the Members and is attached to these minutes as Schedule A. Dr. Prince invited Mr. McManus to present the background information relating to this Regulation and its proposed amendment.
5. Mr. McManus began by outlining the problems faced by the Canadian uranium industry in the early 1970's, especially in view of the U.S. embargo against uranium imports to that country, the ending of Canadian stockpile arrangements, and the soft nature of the international market.

21(1)(b)

and

24 (1)

6. Last summer, a series of U.S. court cases involving Westinghouse Electric Corporation gave rise to an initiative to obtain, from Canadian sources, information on the marketing arrangement through the "letters rogatory" process. Canadian government concern re the leakage of this information gave rise to the original Uranium Information Security Regulation (SOR/DORS/76-644, 23 September, 1976), attached as Schedule B.

21(1)(b)

24 (1)

7. Opposition members, particularly Sinclair Stevens (M.P. - York-Simcoe) have been very critical of the marketing arrangement and the original Regulation and have challenged the legality of the Regulation in the Ontario Supreme Court (decision pending). Other challenges to the Regulations and politically-embarrassing situations have also arisen.

69(1)(b)

8. Dr. Prince then invited Mr. MacIsaac to summarize the applicable parts of the Atomic Energy Control Act and Regulations as they pertain to the amended Regulation. Mr. MacIsaac referred to Section 9 of the Act and cited a previous case (application by Westinghouse Electric Corporation re letters rogatory heard in Supreme Court of Ontario before the Honourable Justice Sydney Robins, released 29 June, 1977) where subsections (e) and (g) were held to be valid bases for such a Regulation. On these grounds, it has been concluded that the original and proposed Regulations are valid. It was also noted that the challenge to the original Regulation, presently before the Ontario Supreme Court will be a better legal test of the statutory basis for the Regulation.

9. Mr. McManus indicated that it is the government's plan to pass the order-in-council for the promulgation of the amended Regulation and the cancellation of the original Regulation tomorrow and to have Mr. Gillespie announce these actions on Friday and at the same time make public copies of diplomatic correspondence relating to the U.S.A. embargo and copies of seven selected Ministerial directives to the Board.

Appendix 7 Documents Associated With the False Claim of
Cabinet Confidentiality in the UFFI Case

The October 9, 1984 Section 69 Certificate of the Public Works Minister to the Information Commissioner verifying all UFFI records sought were cabinet confidences and Mr. LaSalle's April 3, 1985 Letter revoking the broad claim made for cabinet confidentiality are provided here.

 Minister
Public Works Canada Ministre
Travaux publics Canada

Ottawa, Ontario
K1A 0M2

October 9, 1984

Mrs. Inger Hansen,
Information Commissioner,
Office of the Information Commissioner
Tower 'B', Place de Ville,
112 Kent Street,
Ottawa, Ontario.
K1A 1H3

Dear Mrs. Hansen:

I certify that the documents which are the subject of Access Request No. 802-R1-2 and for which you have requested a certificate in your letter of August 22, 1984, are a confidence of the Queen's Privy Council for Canada within the meaning of paragraphs 69(1)(b) and 69(1)(g) of the Access to Information Act as they are discussion papers and supporting documentation concerning an investigation into the use of urea-formaldehyde foam insulation in Government-owned buildings. These papers identify locations, assessment of conditions and recommendations to Cabinet to resolve these issues.

I further certify that the documents in question have not been in existence for more than twenty years and that they are documents as described in paragraphs 69(1)(b) and 69(1)(g) of the Access to Information Act to which paragraph 69(3)(b) of the Access to Information Act does not apply.

Yours truly,

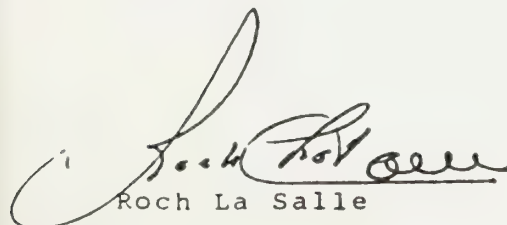
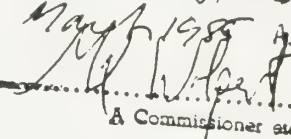

Roch La Salle

EXHIBIT L
Court Case T-495-85

OCT 9 1984

This is Exhibit L
Affidavit of Ken Rubin
Sworn before me this 8th day
day of May 1985 A.D.

A Commissioner etc.

Ottawa, Ontario
K1A 0M2

Our File
802-R1-2

APR
AVR - 3 1985

Ms. Inger Hansen
Information Commissioner
Tower "B", Place de Ville
112 Kent Street
Ottawa, Ontario
K1A 1H3

Dear Ms. Hansen:

On 22 August 1984, your Director of Information Complaints requested of my predecessor, the Honourable Charles Lapointe, a certificate stating that certain records denied an applicant under the Access to Information Act were "Cabinet Confidences" within the context of section 69 of the Act.

It has been brought to my attention that, due to some administrative oversights in the Department of Public Works and the increased activity associated with the change in government at the time, I erroneously signed and sent to you the certificate requested by your official. I wish to withdraw my certificate of 9 October 1984. It is my understanding that Mr. Osbaldeston of the Privy Council Office will provide you with a new certificate in the near future.

Please accept my apologies for any inconvenience this error may have caused.

Yours truly,
ORIGINAL SIGNÉ PAR
ROCH LA SALLE
ORIGINAL SIGNED BY

Roch La Salle

→ c.c.- Ken Rubin
c.c.- Headquarters' Executive Correspondence
Section
c.c.- Executive Secretary
c.c.- Minister's copy
c.c.- W. Elcock
Sr Legal Counsel
c.c.- B. McIsaac

Appendix 8 Examples of Departmental Reports to the
PCO on The Use of Section 69

The below External and National Defence reports on Section 69 use provide the differing degree of information filed on specific claims of cabinet confidentiality with PCO.

REPORT FORM

(s. 69: Access to Information Act)

DATE:

THIS RECORD IS DISCLOSED UNDER THE
CANADIAN ACCESS TO INFORMATION
ACT,
CE DOCUMENT EST COMMUNIQUE EN
VERTU DE LA LOI CANADIENNE SUR
L'ACCÈS À L'INFORMATION.

GOVERNMENT INSTITUTION: Department of National Defence (DND)

DESCRIPTION OF RECORD: Capital Estimates Information Book
FY 84/85 Narrative Update - CF 18
Aircraft Project Overview.

Date: 19 Jan 84

To: DPSF - DND

From: SASPM/CF-18 - DND

Title: CF 18 Project Overview

Identification Number: 11500MD-1(SASPM/CF-18) 19 Jan 84

SPECIFIC PARAGRAPHS APPLIED: 69(1)(g)

OFFICER APPROVING EXCLUSION:

Name: The Right Honorable Joe Clark

Title: Minister of National Defence

Name: C.J. Gauthier

Title: DND Coordinator
Access to Information

Telephone: 992-8486

REPORT FORM

(s. 69: Access to Information Act)

DATE: February 1985

GOVERNMENT INSTITUTION: Department of National Defence (DND)

DESCRIPTION OF RECORD:

Date:

To:

From:

Title:

Identification Number:

69(1)(g)

SPECIFIC PARAGRAPHS APPLIED: 69(1)(e)

OFFICER APPROVING EXCLUSION:

Name: Robert C. Coates

Title: Minister of National Defence

THIS IS THE RELEASABLE PORTION OF A
RECORD REQUESTED UNDER THE CANADIAN
ACCESS TO INFORMATION ACT.
VOICI LA PARTIE COMMUNICABLE DU DOS-
SIER DONT LA CONSULTATION EST REQUISE
EN VERTU DE LA LOI SUR L'ACCÈS À L'INFOR-
MATION.

Name: C.J. Gauthier
Title: DND Coordinator
Access to Informat
Telephone: 992-8486

THIS RECORD IS DISCLOSED UNDER THE
CANADIAN ACCESS TO INFORMATION
ACT.

CE DOCUMENT EST COMMUNICABLE EN
VERTU DE LA LOI CANADIENNE SUR
L'ACCÈS À L'INFORMATION.

REPORT FORM

(s. 69: Access to Information Act; s.70: Privacy Act)

DATE: January 25, 1985

GOVERNMENT INSTITUTION: Department of External Affairs

DESCRIPTION OF RECORD

Date: December 21, 1983

To: Mr. Earl Wiseman

From: Mark J. Moher

Title: Nuclear Cooperation with Portugal

Identification Number: ETN-0050

SPECIFIC PARAGRAPHS APPLIED: 69(1)(g)

OFFICER APPROVING EXCLUSION

Name: Kenneth C. Brown

Title: Co-ordinator, Access to Information and Privacy

Name: Kenneth C. Brown

Title: Co-ordinator, Access to
Information and Privacy

Telephone: 992-1425

Note: Only selected sentences were excluded.

MCBI#22

3 1761 11465325 6

